Supreme Court, U.S.
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No. .....

In The
# Supreme Court of the United States
October Term, 1987

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TERRY ROGERS,
*Appellant,*

v.

CITY OF CHEYENNE,
*Appellee.*

—o—

**ON APPEAL FROM THE SUPREME COURT OF WYOMING**

—o—

## JURISDICTIONAL STATEMENT

—o—

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## QUESTION PRESENTED

The City of Cheyenne, Wyoming, has adopted a Municipal Airport Zoning Ordinance which imposes a height limitation upon structures and trees within a described aircraft glide path ("non-instrument approach zone") to the municipal airport.

The question in this case is whether the height limitation ordinance violates the "Taking Clause" of the Fifth Amendment when, without just compensation, application of the ordinance to a surface owner's property results in actual use, invasion and occupation by the public for a public purpose of the landowner's vested and ordinarily useable airspace, forbids any use of the airspace by the landowner and causes him actual damage.

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## ON APPEAL FROM THE SUPREME COURT OF WYOMING

## JURISDICTIONAL STATEMENT

## OPINIONS BELOW

The opinion of the Supreme Court of the State of Wyoming, which is the subject of this appeal, appears in Appendix A at App. 1, *infra* and is reported at 747 P.2d 1137 (Wyo.1987).

The companion case of *Cheyenne Airport Board et.al. v. Terry Rogers et.al.*, which is followed in all respects by

the Wyoming Supreme Court in this case, is found at 707 P.2d 717 (Wyo.1985) and appears in Appendix B at App. 9, *infra*.

The findings of fact and conclusions of law of the Municipal Court of the City of Cheyenne are not officially reported. A copy of the Court's oral comments at the conclusion of the hearing upon appellant's Motion to Dismiss appears in Appendix C at App. 38, *infra*. The decision letter and order of the District Court of Laramie County, Wyoming, appear in Appendix D, App. 40, *infra*.

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## JURISDICTION

Terry Rogers, appellant, appeals from the final judgment of the Supreme Court of the State of Wyoming affirming his conviction of violating the municipal code and holding that a height limitation ordinance did not constitute a violation of the Taking Clause of the Fifth Amendment following *Cheyenne Airport Board v. Rogers*, 707 P.2d.717(Wyo.1985), *appeal dismissed*, —U.S.—, 106 S.Ct. 1961, 90 L.Ed.2d 647 (1986).

The judgment of the Supreme Court of Wyoming was entered on December 29, 1987. See Appendix A, App. 1, *infra*. A Notice of Appeal to this Court was duly filed in the Supreme Court of Wyoming on the 8th day of January, 1988. See Appendix E, App. 43, *infra*.

This appeal is being docketed in this Court within 90 days from the entry of the final judgment below. Since this case is one where there is drawn in question a state statute on the ground of its being repugnant to the Con-

stitution of the United States and the decision below was in favor of its validity, the jurisdiction of this Court is involved pursuant to 28 U.S.C. § 1257(2).

Since this case draws into question the constitutionality of a statute of the State of Wyoming, namely, the Cheyenne Municipal Airport Zoning Ordinance, and neither the State of Wyoming nor any agency, officer or employee of the State of Wyoming is a party, it is noted that 28 U.S.C. § 2403(b) may be involved.

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## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> ". . . nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law;

49 U.S.C. 1301(29) provides in pertinent part:

> "Navigable airspace" means airspace above the minimum altitudes of flight prescribed by regulations issued under this Act, and shall include airspace needed to insure safety in taking-off and landing of aircraft.

49 U.S.C. 1304 provides in pertinent part:

> There is hereby recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States.

49 U.S.C. 1508 provides in pertinent part:

> The United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States, including the airspace above all inland waters and the airspace above those portions of the adjacent marginal high seas, bays, and lakes over which by international law or treaty or convention the United States exercises national jurisdiction.

49 U.S.C. § 1718(a) (3) provides:

> *Airport hazards.* The aerial approaches to the airport will be adequately cleared and protected by removing, lowering, relocating, marking, or lighting or otherwise mitigating existing airport hazards and by preventing the establishment or creation of future airport hazards;

49 U.S.C. § 1718(a) (4) provides:

> *Compatible use of adjacent land.* Appropriate action, including the adoption of zoning laws, has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including landing and takeoff of aircraft;

Wyo. Stat. 1-3-103 provides:

> An action for the recovery of the title or possession of lands, tenements or hereditaments can only be brought within ten years after the cause of such action accrues.

Wyo. State. 10-4-301 provides:

> Sovereignty in the space above the lands and waters of this state is declared to rest in the state except where assumed by the United States Law.

Wyo. Stat. 10-4-302 provides:

> The ownership of the space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath subject to the right of flight described in W.S. 10-4-303.

Wyo. Stat. 10-4-303(a) provides:

> (a) Flight in aircraft over the lands and waters of this state is lawful unless it is:
>
> (i) At such a low altitude as to interfere with the existing use to which the land or water, or the space over the land or water, is put by the owner;
>
> (ii) Conducted as to be imminently dangerous to persons or property lawfully on the land or water; or
>
> (iii) In violation of the air commerce regulations promulgated by the Department of Transportation of the United States.

Wyo. Stat. 10-5-301 provides:

> (a) The governing body of each incorporated Wyoming municipality and county may regulate and restrict by ordinancy the number of stories and size of buildings and the height of other structures constructed upon land within one-half (½) mile of the boundaries of airports owned or controlled by the town, city or county. They may provide zoning for airspace beyond one-half (½) mile of the boundaries and within the county, to assure aircraft reasonable safety for visual and instrument approach and departure. The right to zone shall be confined to the geographical limits of the current applicable approach zone established by the Federal Aviation Administration for the partic-

ular airport and in no case shall the right to zone extend beyond six (6) nautical miles along the approach path from the end of the instrument runway.

Section 3(2) of the Cheyenne Municipal Airport Zoning Ordinance provides:

> A noninstrument approach zone is established at each end of all noninstrument runways on the Cheyenne Municipal Airport for noninstrument landings and takeoffs. The noninstrument approach zone shall have a width of five hundred (500) feet at a distance of two hundred (200) feet beyond each end of the runway, widening thereafter uniformly to a width of two thousand five hundred (2,500) feet at a distance of ten thousand two hundred (10,200) feet beyond each end of the runway, its centerline being the continuation of the centerline of the runway.

Section 4(2) of the Cheyenne Municipal Airport Zoning Ordinance provides in pertinent part:

> Except as otherwise provided in this ordinance, no structure or tree shall be erected, altered, allowed to grow, or maintained in any zone created by this ordinance to a height in excess of the height limit herein established for such zone. Such height limitations are hereby established for each of the zones in question as follows:
>
> * * * *
>
> (2) Noninstrumental approach zones: One foot in height for each forty (40) feet in horizontal distance beginning at a point two hundred (200) feet from and at the elevation of the end of the noninstrument runway and extending to a point ten thousand two hundred (10,200) feet from the end of the runway; . . . .
>
> * * * *

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## STATEMENT OF THE CASE

This case involves the important question of whether an airport height limitation zoning ordinance, the purpose of which is to provide a clear aerial approach to a public airport, is constitutionally valid when application of the ordinance permits actual public use, occupation and invasion of a landowner's reasonably useable and "vested" airspace, forbids use of the airspace by the landowner and causes actual damage to the landowner.

The ordinance in question, which is authorized by state law, (Wyo. Stat. 10-5-301(a)), restricts the height of structures and trees within the immediate vicinity of the airport based upon a 40-to-1 glide angle for approaching aircraft. Section 4(2) Cheyenne Municipal Airport Zoning Ordinance. Appellant's residence falls within the purview of the zone and a large, fully developed cottonwood tree on his property extends into the prohibited height limitation zone.

Prior to trial the appellant sought and was denied a variance from application of the ordinance and submitted a claim for damages to the City of Cheyenne which was also denied.

Appellant also sought declaratory and injunctive relief in a state court civil action. The Wyoming Supreme Court reversed the lower court and held that no taking would occur upon enforcement of the ordinance. *Cheyenne Airport Board v. Rogers*, 707 P.2d 717 (Wyo.1985), *appeal dismissed*, — U.S. —, 106 S.Ct. 1961, 90 L.Ed.2d 647 (1986). The *Cheyenne Airport Board* case was followed and reaffirmed in this case. See *Rogers v. City of Cheyenne*, 747 P.2d 1137, 1139 (Wyo.1987).

Appellant was then criminally prosecuted in the Municipal Court for the City of Cheyenne for violation of the

ordinance and he filed a Motion to Dismiss the Complaint on the ground that the ordinance, as applied to his property, constituted a "taking" under the Fifth and Fourteenth Amendments and was, therefore, unconstitutional.

Uncontroverted evidence showed that the tree on appellant's property was 48 feet tall and extended some 23 feet into the non-instrument approach zone and, to bring it into conformity with the ordinance, it would have to be cut nearly in half so that its crown was not more than 25 feet above the ground. (See Appendix F, Exhibit "A").

Expert testimony established that if the tree was cut to the prescribed height a total loss of the tree would occur equal to an actual financial loss of $2,064.00.

It was also established that the ordinance forbade use of the airspace by the landowner, and that the purpose of the ordinance was to allow aircraft, during flight, to physically invade and occupy the airspace above the appellant's property then occupied by his tree.

The municipal court, following *Cheyenne Airport Board, supra,* denied appellant's Motion, found him guilty of violating the city code and imposed a continuing $200.00 daily fine.

After an intermediate appeal to the District Court, which affirmed the municipal court, the Supreme Court of the State of Wyoming once again reviewed the constitutionality of the ordinance and reaffirmed its holding in *Cheyenne Airport Board, supra,* in all respects, upholding appellant's conviction. *Rogers, supra,* p. 1139.

The Court found that the ordinance was constitutional on all grounds—even in light of the recent decisions of *First English Evangelical Lutheran Church of Glendale*

*v. Los Angeles Co.*, — U.S. — 107 S.Ct. 2378, 96 L.Ed.2d 250, (1987) and *Nollan v. California Coastal Commission*, — U.S. —, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987).

*Cheyenne Airport Board, supra,* the case followed by the lower court, held that by virtue of the *Air Commerce Act of 1926* (49 U.S.C. 1304) or the *Wyoming Uniform State Law for Aeronautics of 1931* (Wyo. Stat. § 10-4-301), which declare a public right of free transit through "navigable airspace," or by virtue of assumed actual aircraft overflight, the appellant's cause of action was barred by the ten year statute of limitations for recovery of real estate. (See Wyo. Stat. 1-3-103). As a precursor to this holding, the Court found that an easement had been created by state and federal statutory declarations of rights of flight and sovereignty or by repeated physical acts of overflight. This finding was reiterated by the court in the instant case. *Rogers, supra,* p. 1139. *Cheyenne Airport Board, supra,* p. 725.

The Court further found that the ordinance complied with the requirements of substantive due process as being rationally related to a legitimate state interest, citing *Gorieb v. Fox,* 274 U.S. 603, 47 S.Ct. 675, 71 L.Ed. 1228 (1928), *Village of Euclid, Ohio v. Ambler Realty Co.,* 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926) and *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). *Cheyenne Airport Board supra,* p. 728-729.

Most importantly the court in *Cheyenne Airport Board* held that, as applied to appellant, the ordinance did not constitute a "taking" because the appellants had not shown a significant enough impact to counterbalance a significant public interest in protecting the airport flight

path, citing *Penn Central Transportation Co. v. City of New York, supra. Cheyenne Airport Board, supra,* p. 732.

In *Cheyenne Airport Board* the Court stated that appellants had not sought a variance prior to suit. *Cheyenne Airport Board, supra,* p. 723. This assertion may have affected the maturity or "ripeness" of that case for review in this court. *Williamson County Regional Planning Commission v. Hamilton Bank,* 473 U.S. —, 105 S.Ct. 1381, 87 L.Ed.2d 1268 (1985). However, as state previously, it is undisputed that appellant has applied for and been denied a variance in the present case.

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## THE QUESTION IS SUBSTANTIAL

### a.

### There is a conflict among the states regarding the constitutionality of airport height limitation ordinances

The Supreme Court of the State of Wyoming has erroneously held to be valid under the "Taking Clause" a zoning ordinance which, when applied to appellant's property, requires him, without compensation, to permit public air flight through his enveloping airspace at an altitude of 25 feet, (See Exhibit A, Appendix F, *infra,* App. 45), forbids any use of that portion of airspace by the appellant-owner and causes him actual damage. This is permitted even though ownership of the airspace is vested in appellant by state law. See Wyo. Stat. § 10-4-302.

The constitutionality of airport height limitation ordinances has arisen on numerous occasions but, though once granting certiorari on the issue, the question has never been directly passed upon by this court.

The Supreme Court in *Jankovich v. Indiana Toll Road*, 379 U.S. 487, 13 L.Ed.2d 439, 85 S.Ct. 493 (1965), a case remarkably similar to this case, initially granted certiorari to consider the validity of airport height limitation zoning regulations under the Fourteenth Amendment but eventually declined to rule upon the merits of the "Taking" issue. It found, instead, that the Indiana Supreme Court had relied upon the Indiana Constitution as well as the Due Process Clause of the Fourteenth Amendment to strike down the ordinance as a taking. *Jankovich, supra*, p. 489. Therefore, the writ of certiorari was dismissed because the judgment was supported by an independent and adequate state ground. *Jankovich, supra*, p. 489. The Court specifically noted that it expressed no opinion regarding validity under the United States Constitution of the airport zoning ordinance. *Jankovich, supra*, p. 495, fn. 3.

However, even though this court has not directly ruled upon the issue, a number of state courts of last resort have held height limitation ordinances permitting such low flight of aircraft to constitute a "taking" of property without compensation under the Fifth Amendment and have either enjoined enforcement or ordered compensation to be made. See *Yara Engineering Corporation v. Newark*, 40 A.2d 559 (N.J. 1945); *Rice v. Newark*, 40 A.2d 561 (N.J. 1945); *Indiana Toll Road Commission v. Jankovich*, 193 N.E. 2d 237 (Ind. 1963); *Roark v. City of Caldwell*, 394 P.2d 641 (Id. 1964); *Jackson Municipal Airport Authority v. Evans*, 191 S.2d 126 (Miss. 1966); *Hageman v. Board of Trustees of Wayne Township*, 20 Ohio App.2d 12, 251 N.E. 2d 507 (1969); *Jackson Airport Authority v. Wright*, 232 S.2d 709 (Miss. 1970); *McShane v. City of Fairbault*, 292 N.W.2d 283 (Minn. 1980).

Other courts have either not reached the "taking" issue or have found no damage to the property in question. See *Harrel's Candy Kitchen v. Sarasota-Manatee Airport Authority*, 111 S.2d 439 (Fla.App. 1962); *Village of Willoughby Hills v. Corrigan*, 29 Ohio St.2d 39, 278 N.E.2d 658 (1962); *Baggett v. City of Montgomery*, 276 Ala. 166, 160 S.2d 6 (1964); *LaSalle National Bank v. County of Cook*, 34 Ill.App.3d 264, 340 N.E.2d 79 (1975).

The Supreme Court of Wyoming is the only state court of last resort to hold that an airport height limitation ordinance is constitutional under the "Taking Clause" of the Fifth Amendment, as applied to the states by Fourteenth Amendment, (*Chicago Burlington and Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226, S.Ct. 581, 41 L.Ed. 979 (1897)), where there is proof that the purpose of the ordinance is to permit actual physical invasion, direct or indirect, of reasonably useable, immediately enveloping airspace. *Cheyenne Airport Board, supra*, p. 731.

In so holding the court erroneously ruled that the multifactor standards set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978) should be applied where the zoning regulation results in actual invasion and use of private airspace to permit a uniquely public purpose—public air transportation. This ruling runs directly counter to previous decisions of this court holding that direct or indirect invasions of property by the public or the government for a public purpose is a "taking" and that giving individuals a permanent and continuous right to pass through property constitutes "permanent occupation" necessary to effectuate a "taking." *United States v. Causby*, 328 U.S. 256, 123-128, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946); *Griggs*

*v. County of Allegheny, Pennsylvania*, 369 U.S. 84, 82 S.Ct. 531, 7 L.Ed.2d 585 (1962); *Nollan v. California Coastal Commission*, — U.S. —, 97 L.Ed.2d 677, 685, — S.Ct. — (1987).

In *Loretto v. Teleprompter CATV Corp.*, 458 U.S. 419, 434-435, 73 L.Ed.2d 868, 102 S.Ct. 3164 (1982) this court observed that where governmental action results in a permanent physical occupation "[a] taking has occurred without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."

The rule that permanent physical occupation results in a taking was recently reiterated in *Nollan v. California Coastal Commission, supra*, where this court held that giving individuals "[a] permanent and continuous right to pass and fro . . ." across real property constitutes a ". . . permanent physical occupation." *Nollan, supra*, 97 L.Ed.2d 677, 686.

The lower court also erred in once again holding that the government had acquired an air easement in appellant's property by virtue of enactment of the *Air Commerce Act of 1926*, (49 U.S.C. 1304), or the *Wyoming Law on Aeronautics*. (W.S. 10-4-301). This court long ago decided that right of transit and sovereignty does not afford property rights to the government. *Braniff Airways v. Nebraska State Board of Equalization and Assessment*, 347 U.S. 590, 74 S.Ct. 757, 98 L.Ed. 967 (1954).

In light of the division of authority among the states created by Wyoming Supreme Court's direct conflict with other state court decisions regarding the validity of airport height limitation ordinances under the "Taking

Clause", and in view of this court's previous holdings relating to invasions of airspace by aircraft, (*Griggs, supra*), actual use and occupation of property by the government or public, (*Loretto, supra*), and permitting the public to traverse private property (*Nollan, supra*), this court should note probable jurisdiction to define constitutional limitations of so-called height limitation ordinances.

Also, given the provisions of the *National Airport Plan*, (See 49 U.S.C. § 1718(a)(3) and (4)), requiring recipients of federal grants to provide assurance of clear airspace through adoption of zoning laws and the apparent wide use of airport height limitation zoning ordinances, this case presents the important constitutional questions which this court eventually declined to rule upon in *Jankovich v. Indiana Toll Road, supra*.

**b.**

**This court has held that use of reasonably useable enveloping airspace for public air flight constitutes a "taking."**

In *United States v. Causby*, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946), a landowner brought an action against the United States for damages in the U.S. Court of Claims because low flying aircraft were disturbing his chicken raising enterprise causing him to go out of business. *Causby, supra*, p. 258. The federal government argued that since the Congress had assumed "sovereignty" in navigable airspace and since the flights were within minimum safe altitudes, no "taking" had occurred and such flights were an exercise of the declared right of travel through airspace. *Causby, supra*, p. 260. The government also argued that in order for a "taking" to occur,

the land would have to be rendered useless. *Causby, supra*, p. 261.

This court disagreed and held that even though airspace is a public highway, if a landowner ". . . is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere." *Causby, supra*, p. 264. Relying on state law nearly identical to Wyoming Law which "vests" ownership of airspace in the owners of the surface subject to "lawful flight" which cannot be at such low altitude as to interfere with existing uses of land beneath, (Wyo. Stat. §§ 10-4-302 and 10-4-303), the *Causby* court held that low-level flights imposed a "servitude" upon the land and such was a "taking." *Causby, supra*, p. 266-267.

The same result was reached in *Griggs v. County of Allegheny, Pennsylvania, supra*, after the enactment of the Federal Aviation Act of 1958 (49 U.S.C. 1301 et.seq.) which redefined navigable airspace as including airspace needed for landing and taking-off of aircraft. (49 U.S.C. 1301 (29)). This court again held that despite such redefinition a "taking" occurred when low-flying aircraft made the landowner's life "unbearable." *Griggs, supra*, p. 87, 88-89, citing *Ackerman v. Port of Seattle*, 348 P.2d 664 (Wash. 1960).

Thus, *Causby* and *Griggs* provide the basis upon which many state courts have held that low-flying aircraft, even if they were within "navigable airspace," and ordinances providing for obstruction free approach zones, cause a taking to occur.

Nevertheless, since this court has never directly ruled upon the constitutionality of such ordinances, the important question remains as to whether or not, and under

what circumstances, they effect a taking in light of the advent of the balancing tests first set forth by this court in *Penn Central Transportation Co. v. New York City, supra.* This case directly presents the issue to this court.

**c.**

**Utilization of the "Multifactor Standards" of Penn Central Transportation Co. is inappropriate; "Physical Occupation" being "Determinative."**

It is clear that this court has long held that low-level flight of aircraft which causes damage to or prevents reasonable use of the surface land and its enveloping airspace constitutes a "taking" requiring compensation. (See *Causby,* and *Griggs, supra*).

The question in this case, however, is whether a zoning ordinance enacted to create unobstructed approach zones for low-level flight of airplanes at a public airport is a "taking" under circumstances where there is actual occupation of property and actual damages, given the holdings in *Causby* and *Griggs, supra,* and other holdings of this court regarding zoning and "taking."

Zoning ordinances, in general, have been approved as not being violative of the "Taking Clause" so long as the regulation of land use is reasonably calculated to promote "health, safety, morals, or general welfare." *Euclid v. Ambler Realty Co.,* 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); *Gorieb v. Fox,* 274 U.S. 603, 47 S.Ct. 675, 71 L.Ed. 1228 (1927); *Goldblatt v. Town of Hempstead, New York,* 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962).

However, in a number of instances, beginning with *Pennsylvania Coal Co. v Mahon,* 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922), this court has also held that a law or regulation that substantially furthers important public policies may " . . . so frustrate distinct investment backed expectations as to amount to a 'taking.' " *Penn Central Transportation Co., supra,* p. 127. See *Kaiser Aetna v. United States,* 444 U.S. 164, 62 L.Ed.2d 332, 100 S.Ct. 383 (1979).

Even though this court has said there is "no set formula" for determining where a regulation, law or ordinance ceases to be a valid exercise of the "police power" and becomes, instead, a "taking," *(Goldblatt, supra,* p. 594), in *Penn Central Transportation Co., supra,* the court attempted to set forth standards to aid courts in making such determinations. In *Penn Central* the court said that the significance of the governmental interest involved, the economic impact of the regulation and the character of the governmental action are factual inquiries which may guide courts in determining the "taking" question. 438 U.S. at 130-131.

In *Loretto, supra,* this court set forth an important *per se* rule which makes unnecessary any analysis of the "taking" issue under many of the *Penn Central* "tests." The court held that when the "character of the governmental action" constitutes an intrusion which reaches the extreme form of a permanent physical occupation, a "taking" has occurred. The *Loretto* court said that such a physical occupation is not only an important factor in *Loretto, supra,* p. 425.

In *Kaiser-Aetna, supra,* cited by the *Loretto* court, the court used the determinative "physical occupation" test

and held that to compel an owner of a private marina to allow public access under the "navigable waters" serviture was allowing a physical invasion of the privately owned marina and held that a taking had occured. *Kaiser-Aetna, supra,* p. 180. See also *Pumpelly v. Green Bay and Mississippi Canal Co.,* 80 U.S. 166, 13 Wall. 166, 20 L.Ed. 557 (1871).

Again, in *Nollan v. California Coastal Commission,* a case involving land use regulation for aesthetic purposes, this court, relying on *Loretto, supra,* held that a regulatory requirement to permit a right of public access to private property constituted a "taking" without compensation. *Nollan, supra,* 97 L.Ed.2d p. 686.

In the case on appeal, it is clear that the purpose of the ordinance was to allow aircraft to fly through appellant's airspace, ownership of which is "vested" in him as the owner of the surface pursuant to state law, (Wyo. Stat. § 10-4-302), to provide clear airspace for the takeoff and landing of aircraft by the public. Such a physical invasion should be the determinative factor in resolving the taking issue in this case pursuant to *Causby, Griggs, Loretto, Kaiser-Aetna* and *Nollan, supra.*

Use of the multifactor standards of *Penn Central Transportation Co., supra,* as did the court in *Cheyenne Airport Board, supra,* and the lower court in *Rogers, supra,* should be held to be inappropriate when a physical invasion is accomplished or sought by regulation and to be a misconception of the standards set forth in *Penn Central.* This result should be evident since *Penn Central* specifically distinguished its facts from those in *Causby. Penn Central, supra,* p. 135.

### d.

**The federal government does not own an easement in reasonably useable enveloping airspace by virtue of congressional declarations of sovereignty and rights of public transit.**

The court in *Cheyenne Airport Board* grievously erred when it held that when the United States declared a right of free transit through navigable airspace (49 U.S.C. 1304 (1958)), it acquired an easement, giving rise to a claim for recovery of real property for which the Statute of Limitations (Wyo. Stat. 1-3-103) had long since expired. *Cheyenne Airport Board, supra,* p. 725. Reiteration of this holding by the lower court in this case compounds and reinforces the error. See *Rogers, supra,* p. 1139.

*Braniff Airways, supra,* at p. 596, held that the declaration of national sovereignty in airspace (49 U.S.C. 1508) was bottomed in the commerce power of Congress, not on national ownership in airspace. Clearly, they, by virtue of the common law of ownership of airspace and the Wyoming statute "vesting" in surface owners the airspace above the surface, subject to a lawful and noninterfering right of flight, (See Wyo. Stat. 10-4-302 and 303, supra), the appellants owned the airspace above their surface land which they use by having a tree.

To hold, as did the court in *Cheyenne Airport Board,* that a cause of action accrued upon congressional or state declarations of public transit through and sovereignty in airspace, and assumed overflight, is err since a party must have "standing" to sue. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978).

**e.**

**Summary**

In sum, this case, *Rogers v. City of Cheyenne, supra* and its predecessor, *Cheyenne Airport Board v. Rogers, supra,* are in direct conflict with a number of state court opinions and misapply or misconstrue several applicable opinions of this court regarding the issue of "taking." This court should note probable jurisdiction to resolve a clear conflict among state courts of last resort, the Wyoming Supreme Court's conflict with decisions of this court and to resolve an important question, not previously considered by this court, regarding height limitation ordinances as they might effect the National Airport Plan. (49 U.S.C. 1718 et seq.).

—o—

## CONCLUSION

Probable jurisdiction should be noted.*

Respectfully submitted,

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DATE: March, 1988

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* The Court may wish to consider summary reversal in light of *Causby, Griggs, Kaiser-Aetna, Loretto* and *Nollan.*

## APPENDIX A

Terry ROGERS, Appellant (Defendant),

v.

CITY OF CHEYENNE,
Appellee (Plaintiff).

No. 87-82.

Supreme Court of Wyoming.

Dec. 29, 1987.

Landowner was convicted in the District Court, Laramie County, Edward L. Grant, J., of violating city zoning ordinance imposing height limitations for trees in noninstrument approach zone of municipal airport, and he appealed. The Supreme Court, Cardine, J., held that: (1) zoning ordinance did not effect unconstitutional taking, and (2) there was sufficient evidence that landowner was under duty to trim tree to support his conviction.

Affirmed.

Bernard Q. Phelan, Cheyenne, for appellant.

R. Walter Connell, Deputy City Atty., for appellee.

Before BROWN, C.J., and THOMAS, CARDINE, URBIGKIT, and MACY, JJ.

CARDINE, Justice.

Appellant Terry Rogers was convicted of violating Cheyenne Ordinance No. 1969, § 4, Code Appendix B, because a tree on his property exceeded height limitations for trees in a noninstrument approach zone of the Cheyenne Municipal Airport. He challenges his conviction on two grounds. First, he contends that the zoning ordinance

is unconstitutional. Second, he contends that there was insufficient evidence to support his conviction.

We affirm.

In July 1982 airport officials notified appellant that a tree on his property was not in conformance with a city zoning ordinance imposing height limitations for trees in a noninstrument approach zone of the Cheyenne Municipal Airport. Appellant refused to trim the tree. In April 1984 appellant and his wife filed an action seeking a declaratory judgment that the zoning ordinance effected an unconstitutional taking in violation of the Wyoming and United States constitutions. They also sought an injunction prohibiting enforcement of the ordinance. After a bench trial, the district court found the statute "to be unconstitutional as applied to the plaintiffs herein as being without just compensation or due process of law." The airport board and the city of Cheyenne appealed to this court; and we reversed the district court, concluding that the ordinance did not effect an unconstitutional taking. *Cheyenne Airport Board v. Rogers*, Wyo., 707 P.2d 717 (1985). Appellant and his wife appealed our decision to the United States Supreme Court, which dismissed the appeal for want of a substantial federal question. *Rogers v. Cheyenne Airport Board*, — U.S. —, 106 S.Ct. 1961, 90 L.Ed.2d 647 (1986). Appellant and his wife then filed an action in federal district court, under 42 U.S.C. § 1983, seeking a declaratory judgment, injunction and damages. That case was dismissed as being barred by "[p]rinciples of full faith and credit, res judicata, * * * comity, equity and federalism." *Rogers v. City of Cheyenne*, No. C86-0276-B (D.Wyo. Dec. 9, 1986). Meanwhile, the tree remained untrimmed.

On June 18, 1986, the city of Cheyenne filed a criminal complaint against appellant, alleging a violation of the zoning ordinance. A trial was held in the municipal court, and on November 10, 1986, the court entered judgment and sentence against appellant finding him guilty of violating the ordinance and ordering him to bring the tree into compliance within ten days or face a continuing fine of $200 per day for each day the tree was not in compliance. Appellant appealed to the district court; and that court dismissed the appeal, concluding that this court's decision in *Cheyenne Airport Board*, supra, was "controlling." Appellant now appeals from the district court's order dismissing his appeal.

With respect to appellant's constitutional challenge, we provided an extensive discussion and decision concerning the constitutionality of the disputed ordinance in *Cheyenne Airport Board*, supra. Appellant now contends that he is not "bound" by that decision because the district court did not have subject matter jurisdiction in that case and the judgment is therefore void. In support of this assertion appellant cites *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), in which the United States Supreme Court held that a taking dispute brought under 42 U.S.C. § 1983 was not ripe, and therefore not justiciable, because the plaintiff landowners had failed to seek a variance from a zoning ordinance and failed to use available state procedures to obtain just compensation before filing the action in federal court. Appellant contends that he too failed to seek a variance before filing his declaratory judgment ac-

tion and, as a result, the action did not present a justiciable controversy.

This court is, of course, not bound by federal justiciability principles, and the United States Supreme Court's decision in *Williamson*, supra, does not control the jurisdictional issue raised by appellant. In Wyoming district courts, jurisdiction and justiciability are governed by Art. 5, § 10 of the Wyoming Constitution as it is interpreted by this court. We have held that the presence of a justiciable controversy is a jurisdictional requirement in a declaratory judgment action, *Mountain West Farm Bureau Mutual Insurance Company, Inc. v. Hallmark Insurance Company*, Wyo., 561 P.2d 706, 710 (1977), and that a judgment rendered by a court without jurisdiction is void and subject to collateral attack. *Stroock v. Kirby Royalties, Inc.*, Wyo., 494 P.2d 197 (1972). But we do not agree with appellant's assertion that his prior declaratory judgment action did not present a justiciable controversy. The justiciability requirement is relaxed in declaratory judgment actions involving matters of great public importance. *Washakie County School District No. One v. Herschler*, Wyo., 606 P.2d 310 (1980). A dispute involving an obstacle in an airport approach zone concerns the safety of air travelers and unquestionably constitutes a matter of great public importance. We reject appellant's contention that the judgment in *Cheyenne Airport Board*, supra, was void for lack of a justiciable controversy.

Appellant contends that, even if the prior civil judgment is not void, he cannot be precluded from relitigating the constitutional issues in this criminal action because of the difference in the burdens of proof in civil and criminal actions. Appellant also urges that this court's analysis

in *Cheyenne Airport Board*, supra, has been called into question by two recent opinions of the United States Supreme Court. We will assume, without deciding, that res judicata principles do not prevent appellant from making a second constitutional challenge in this case.

Appellant urges that our analysis in *Cheyenne Airport Board*, supra, is erroneous in light of two recent United States Supreme Court cases, *First English Evangelical Lutheran Church of Glendale v. Los Angeles County, California*, — U.S. —, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987), and *Nollan v. California Coastal Commission*, — U.S. —, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987). We disagree. In *First Lutheran Church*, the Court held that a landowner was entitled to compensation for a temporary taking which denied him *all use* of his property. Id., 107 S.Ct. at 2388. We fail to see how the opinion affects our analysis in *Cheyenne Airport Board*, supra. In the second recent case relied upon by appellant, *Nollan v. California Coastal Commission*, the Supreme Court held that the California Coastal Commission could not require a public easement across the surface of a landowner's beachfront property as a condition for a building permit. The basis of the Court's holding was that the relationship between the easement condition and the asserted public purpose was so attenuated that it did not meet "even the most untailored standards" of constitutional review. 107 S.Ct. at 3148. This cannot be said of the ordinance in question here; appellant does not even advance the argument. Instead, he relies on the Court's statement in Nollan that if the California Coastal Commission had merely appropriated the easement, rather than attempting to acquire it as a condition of a building permit, a taking would

have occurred. Id. at 3145. Appellant argues that if this reasoning is applied in the present case, the Cheyenne ordinance must be considered an unconstitutional taking because it constitutes an appropriation of an overflight easement. We rejected this argument in *Cheyenne Airport Board*, supra, because we did not view the municipal ordinance as the "creater" or "appropriator" of the flight easement. *Cheyenne Airport Board*, supra, at 725. Instead, the flight easement was created by "state and federal statutory declarations or by the repeated physical acts of overflight." Id. Thus, we viewed the ordinance as a regulation on actual and potential surface uses. Appellant has not convinced us that these conclusions were incorrect. Consequently, we reaffirm our holding in *Cheyenne Airport Board*, supra, and we reject appellant's constitutional challenge in this case.

Appellant next contends that the record contains insufficient evidence to support his conviction. Specifically he argues that the City failed to prove that he was under a duty to trim the tree. This argument is based upon a "grandfather" clause contained in § 6(a) of the ordinance, which provides:

> "The regulations prescribed by this ordinance shall not be construed to require the removal, lowering, or other changes or alteration of any structure or tree not conforming to the regulations as of the effective date of this ordinance, or otherwise interference with the continuance of any nonconforming use."

This section allows for the *continuance* of a nonconforming use. It does not allow the *expansion* of a preexisting nonconforming use, a subject which is addressed in § 7(b):

> "*Existing uses.* No permit shall be granted that would allow the establishment or creation of an air-

> port hazard or permit a nonconforming use, structure, or tree to be made or become higher, or become a greater hazard to air navigation, than it was on the effective date of this ordinance or any amendments thereto or than it is when the application for a permit is made. Except as indicated, all applications for such a permit shall be granted."

We held in *Cheyenne Airport Board*, supra, that this provision prohibits the expansion of a legally protected nonconforming use. In other words, a violation occurred if the tree was allowed to grow higher than it stood in October 1974, when the ordinance was adopted.

When viewing the sufficiency of the evidence to support a criminal conviction, we view the evidence in a light most favorable to the prosecution, along with inferences which may be fairly drawn from it, to determine whether the evidence will support a finding of guilt beyond a reasonable doubt. *Smith v. State*, Wyo., 721 P.2d 1088, 1091 (1986). Applying this standard to the present case, we conclude that appellant's conviction was supported by sufficient evidence. Appellant testified that the tree was trimmed twice, once in the summer of 1974 and again in 1977. The arborist who performed the second trimming testified that the tree had previously been trimmed to a height of approximately thirty feet. The trial court, as the trier of fact, was entitled to conclude from this evidence that the tree was cut to approximately thirty feet in the summer of 1974. The arborist also testified that the tree could be expected to grow anywhere between four inches and two feet per year. If the tree was trimmed to thirty feet in the summer of 1974, it would have been only slightly taller than thirty feet in October 1974, when the ordinance was passed. The evidence indicates that when

appellant was charged with violating the ordinance in 1986, the tree had grown to a height of at least forty-six feet. Thus, the evidence was sufficient to support a finding of an unlawful expansion of a nonconforming use.

Affirmed.

## APPENDIX B

CHEYENNE AIRPORT BOARD and
City of Cheyenne, Appellants
(Defendants),

v.

Terry ROGERS and Brenda Rogers,
Appellees (Plaintiffs).

No. 84-301.

Supreme Court of Wyoming.

Oct. 8, 1985.

Rehearing Denied Nov. 1, 1985.

Landowners brought action against municipal airport board and municipality, seeking declaration that municipal airport zoning ordinance, which provided for noninstrument approach zone to airport and height limitation on such zone, was unconstitutional, and an injunction against enforcement of the ordinance. The District Court, Laramie County, Paul T. Liamos, Jr., J., held the ordinance unconstitutional as applied to landowners and permanently enjoined enforcement of ordinance against the landowners. Airport board and municipality appealed. The Supreme Court, Cardine, J., held that: (1) showing that planes were flying in air space that state and federal governments had reserved for lawful air travel did not establish cause of action or constitutional claim; (2) ordinance did complying with requirements of substantive due process; and (3) landowners had failed to demonstrate significant enough impact from ordinance to counterbalance the significant public interest in protecting

airport flight path so as to make ordinance invalid as an uncompensated taking.

Reversed.

John C. Patton and Royann Fransen of Carmichael, McNiff & Patton, Cheyenne, and R. Walter Connell, Asst. City Atty., Cheyenne, for appellants, oral argument by Patton.

Bernard Q. Phelan, Cheyenne, for appellees.

Before THOMAS, C.J., and ROSE, ROONEY, BROWN and CARDINE, JJ.

CARDINE, Justice.

The question here presented for our determination is whether the City of Cheyenne zoning ordinance providing a height limitation in a noninstrument approach zone to the Cheyenne municipal airport is unconstitutional. The appellees, Terry and Brenda Rogers, own residential property in the noninstrument approach zone. The Rogerses purchased this residential property in 1976, which was two years after passage of the ordinance. The particular height limit on their property, about 26 feet, has not affected the residential usage of the property. It does affect, however, a large cottonwood tree which apparently exceeded the height limit by a few feet on the date the ordinance was passed. By the time of trial the tree had grown to a height of 48 feet and was, therefore, 22 feet above the height limitation.

For reasons that follow, we conclude that the ordinance is constitutional and valid as an exercise of the police power, both in general and as applicable to this case; that

no compensable easement was taken; and, hence, that the judgment of the district court should be reversed.

On October 15, 1974, the City of Cheyenne adopted Ordinance No. 1969, §§ 1-15, Code Appendix B, which is entitled The Cheyenne Municipal Airport Zoning Ordinance. The general purpose of the ordinance is to keep the approach zones to the Cheyenne airport runways free from such obstructions as would interfere with the landing and taking off of airplanes.

Of particular importance to this case are the provisions for a noninstrument approach zone in § 3(2) and a height limitation on such zone in § 4(2) of the ordinance. Section 3(2) states:

> "A noninstrument approach zone is established at each end of all noninstrument runways on the Cheyenne Municipal Airport for noninstrument landings and takeoffs. The noninstrument approach zone shall have a width of five hundred (500) feet at a distance of two hundred (200) feet beyond each end of the runway, widening thereafter uniformly to a width of two thousand five hundred (2,500) feet at a distance of ten thousand two hundred (10,200) feet beyond each end of the runway, its centerline being the continuation of the centerline of the runway."

Section 4 states:

> "Except as otherwise provided in this ordinance, no structure or tree shall be erected, altered, allowed to grow, or maintained in any zone created by this ordinance to a height in excess of the height limit herein established for such zone. Such height limitations are hereby established for each of the zones in question as follows:
>
> * * * * * *

> "(2) *Noninstrument approach zones:* One foot in height for each forty (40) feet in horizontal distance beginning at a point two hundred (200) feet from and at the elevation of the end of the noninstrument runway and extending to a point ten thousand two hundred (10,200) feet from the end of the runway."

The Cheyenne airport zoning ordinance, in contrast to many exercises of municipal zoning which are concerned with purely local matters, was passed under the authority and direction of both state and federal legislative bodies and was designed to protect both state and federal interests. To appreciate this blending of powers and authority, we must briefly examine the legal beginnings of the air age.

The federal government initiated the era of commercial air travel in 1926 with the enactment of the Air Commerce Act of 1926, 49 U.S.C. § 171, which in part declared a "public right of freedom of interstate and foreign air navigation" in the navigable airspace of the United States. Subsequent amendments preserved this declaration. 49 U.S.C. § 403 (1938); 49 U.S.C. § 1304 (1958); 49 U.S.C. § 1304 (Supp.1984).

The State of Wyoming made, in 1931, a similar declaration of right of public passage through the navigable airspace. Section 10-4-302, W.S.1977, asserts:

> "The ownership of the space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath subject to the right of flight described in W.S. 10-4-303 * * *."

Section 10-4-303, W.S.1977, provides:

> "(a) Flight in aircraft over the lands and waters of this state is lawful unless it is:

> "(i) At such a low altitude as to interfere with the existing use to which the land or water, or the space over the land or water, is put by the owners;
>
> "(ii) Conducted as to be imminently dangerous to persons or property lawfully on the land or water; or
>
> "(iii) In violation of the air commerce regulations promulgated by the department of transportation of the United States."

Wyoming intended that its declaration and limitations be compatible with those of the federal government. Section 10-4-304, W.S.1977, states:

> "W.S. 10-4-101 through 10-4-304 shall be construed as to effectuate its general purpose to make uniform the law of those states which enact it and to harmonize, as far as possible, with federal laws and regulations on the subject of aeronautics."

The air commerce regulations alluded to in §§ 10-4-303(a)(iii) and 10-4-304 have, according to John Wood, manager of the Cheyenne airport, specified that approach zones to airport runways be free from obstacles, but they have not specified the method by which this is to be accomplished by state and local governments. Presumably, exercises of eminent domain, police power and negotiated purchase would be equally satisfactory.

The State of Wyoming, in response to these regulations, has specifically authorized its municipalities to zone the approaches to airport runways. Section 10-5-301, W.S.1977, states:

> "(a) The governing body of each incorporated Wyoming municipality and county may regulate and re-

> strict by ordinance the number of stories and size of buildings and the height of other structures constructed upon land within one-half (½) mile of the boundaries of airports owned or controlled by the town, city or county. They may provide zoning for airspace beyond one-half (½) mile of the boundaries and within the county, to assure aircraft reasonable safety for visual and instrument approach and departure. The right to zone shall be confined to the geographical limits of the current applicable approach zone established by the federal aviation administration for the particular airport and in no case shall the right to zone extend beyond six (6) nautical miles along the approach path from the end of the instrument runway."

This provision, permissive and not mandatory in nature, was the basis for the municipal exercise of zoning powers by the City of Cheyenne in adopting §§ 3 and 4, supra, of they Cheyenne Municipal Zoning Ordinance in 1974.

The ordinance was initially designed to operate prospectively and it, therefore, preserved rights in nonconforming uses which had vested on the effective date of the ordinance, § 6 providing that

> "[t]he regulations prescribed by this ordinance shall not be construed to require the removal, lowering, or other changes or alteration of any structure or tree not conforming to the regulations as of the effective date of this ordinance."

However, such vested rights do not include the right of expansion. The ordinance specifically states that new growth or new additions on vested nonconforming uses are prohibited. Section 7(b) of the ordinance provides, in part, that:

> "No permit shall be granted that would allow the establishment of or creation of an airport hazard or permit a nonconforming use, structure, or tree to be made or become higher, or become a greater hazard to air navigation, than it was on the effective date of this ordinance * * *."

This section codifies the general rule that expansion of a legally protected nonconforming use is not allowed. See *Wasinger v. Miller*, 154 Colo. 61, 388 P.2d 250 (1964).

The impact of these sections is to impose an ongoing duty of trimming on the owners of legally protected nonconforming trees. In this case, however, appellees did not make periodic trimmings of their cottonwood and, as stated, it grew to 48 feet at the time of trial. At that point, the pruning necessary to bring the tree into compliance with the ordinance would, according to David Powell, an arborist, quite likely have killed the tree which in his opinion was worth $2,064.

Irrespective of the silvicultural difficulties of pruning such a mature cottonwood, airport officials notified the Rogerses in July of 1982 that the tree was in violation of its protected nonconforming use status, and that the Rogerses would either have to trim it or the airport board would trim it at the Rogerses' expense.

The Rogerses would not accede to this ultimatum. After an unsuccessful attempt to procure advance damages from the City, they posted their property against unauthorized entrance and maintained their refusal to cut the tree. During this time, the Rogerses made no attempt to use the variance procedure provided for in the ordinance. The City of Cheyenne, therefore, was not afforded an opportunity to consider granting a conditional variance

or other relief if appropriate in accordance with § 7(d) of the zoning ordinance which provides, in pertinent part, as follows:

> "Any person desiring to erect or increase the height of any structure, or permit the growth of any tree, or use his property, not in accordance with the regulations prescribed in this ordinance, may apply to the planning commission for a variance from such regulations. Such variances shall be allowed where it is duly found that a literal application or enforcement of the regulations would result in practical difficulty or unnecessary hardship and the relief granted would not be contrary to the public interest but will do substantial justice and be in accordance with the spirit of this ordinance."

On April 12, 1984, the Rogerses commenced this litigation seeking a declaration that the ordinance was unconstitutional, both on its face and as applied to their property, and an injunction against enforcement of the ordinance. With regard to their contention that the ordinance violated both the Wyoming and United States Constitutions, the Rogerses claim that the ordinance represented an uncompensated taking of an easement in the airspace above their property and, also, would effect an unconstitutional taking if applied to the cottonwood tree in question or future trees that might penetrate into the zoned airspace.

The Rogerses' case was tried to the district court on September 20, 1984, and on October 19, 1984, the trial judge issued an order declaring:

> "Section 4(2) of Appendix B of the City Code of the City of Cheyenne * * * to be unconstitutional as applied to the plaintiffs herein as being without just compensation or due process of law."

Furthermore, the trial court permanently enjoined the City of Cheyenne and the Cheyenne Airport Board from the enforcement of Section 4(2) against the Rogerses.

Though somewhat unclear as to scope, the trial judge's ruling may not only have found the ordinance to be unconstitutional as applied but unconstitutional on its face as well. Though the order of October 19 declares the unconstitutionality to be only in the application to the Rogerses, it also purports to incorporate by reference the court's comments which were made at the conclusion of the parties' evidence. The trial judge said at that time, with regard to the ordinance as a whole:

> "I think there is no question here that private property is sought for the public's good and safety and that compensation should be paid. I find that this is not strictly an exercise of police power. It is similar to the construction of a highway * * * the City should condemn and a jury should decide what the damages are to the property by the City's taking."

Thus, it appears that the trial court declared the ordinance to be unconstitutional both as applied to the Rogerses' tree and future surface uses *and* to the extent that it created an overflight easement without the payment of compensation. As so viewed, the following distinct issues are presented for review:

1. Was an actual flight easement taken in the appellees' airspace? If so, is compensation necessary to the validity of such an interest?

2. Is the municipal zoning ordinance, to the extent that it restricts surface uses, a valid exercise of the police power, both in general and as applied to the appellees?

In addressing the issue of whether a compensable easement has been taken in the appellees' airspace, we first note that both the federal government and the State of Wyoming have declared a general right of free public passage through the air. The federal provision, 49 U.S.C. § 1304 (1958) (as amended, Supp.1984), declares on behalf of all citizens, a public right of freedom of transit through the navigable airspace. Section 10-4-303, W.S. 1977, declares that private ownership of the surface is vested subject to the lawful right of flight.

These statutes can be viewed as either the uncompensated appropriation of an easement of flight as an aspect of the public domain, or as a redefining of the recognized extent of legally protectable property. The courts, understanding the need for an accommodation between modern air travel and common law property concepts, and recognizing that rigid notions of compensation for all intrusions ad coelum would effectively preclude commercial air travel, have consistently held, in cases since the federal and state declarations, that surface owners have no cause of action in trespass nor constitutional claim for uncompensated taking unless the exercise of the flight easement by aircraft produces nuisance—such as impacts on the surface. Thus, in the pivotal case of *United States v. Causby*, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946), the Supreme Court of the United States held that compensation to surface owners would be necessary only when overflights were so low and so frequent as to substantially interfere with the use and enjoyment of the property.

The subsequent case of *Griggs v. County of Allegheny, Pennsylvania*, 369 U.S. 84, 82 S.Ct. 531, 7 L.Ed.2d

585 (1962), dealt with overflights emanating from a county-owned airport and crossing property zoned for residential use. The Court held that the overflights would constitute a taking with the necessity of just compensation if such operations made residential use "unbearable" and thus made the property unuseable for its authorized purposes. 369 U.S. at 87-88, 82 S.Ct. at 532-533.

Though some jurisdictions have not insisted on a direct invasion of the airspace for a taking claim (see e.g. *Aaron v. City of Los Angeles*, 40 Cal.App.3d 471, 115 Cal. Rptr. 162 (1974), cert. denied 419 U.S. 1122, 95 S.Ct. 806, 42 L.Ed.2d 822 (1975)), these jurisdictions uniformly require that for a cause of action to exist, a property owner must suffer a substantial interference with the use and enjoyment of the surface. See *Batten v. United States*, 306 F.2d 580 (10th Cir.1962), cert. denied 371 U.S. 955, 83 S.Ct. 506, 9 L.Ed.2d 502 (1963), and Annot., 22 A.L.R.4th 863 (1983). See also § 10-4-303(a), W.S.1977, which codifies this requirement providing that overflight is lawful unless it is:

> "(i) At such a low altitude as to interfere with the existing use to which the land or water, or the space over the land or water, is put by the owner;
>
> "(ii) Conducted as to be imminently dangerous to persons or property lawfully on the land or water; or
>
> "(iii) In violation of the air commerce regulations promulgated by the department of transportation of the United States."

In the present case, the Rogerses have not contended, nor was evidence presented showing, that flights from the Cheyenne airport have caused substantial interference

with the use and enjoyment of their residential property. All that was shown was that planes were flying in the airspace that the state and federal governments have reserved for lawful air travel. This court, under precedent and logic, must hold that such a showing does not establish a cause of action or constitutional claim.

We note also in passing that even if a proper claim based on overflight alone were presented, that such claim would arise either when the United States and Wyoming declared a public right of free transit through the navigable airspace (see 29 U.S.C. § 1304 (1958) (as amended Supp. 1984) and § 10-4-302, W.S.1977), or no later than the date of the first airplane overflight. The Rogerses made no claim for the use of the easement in the airspace until April 12, 1984, and then the claim was directed only against the City of Cheyenne and the airport board. Section 1-3-103, W.S.1977, provides that an action for the recovery of title or possession of lands, tenements or hereditaments can only be brought within ten years after the cause of action accrues. Cases from other jurisdictions indicate that the running of such statutes of limitations bar subsequent claims of inverse condemnation. See Annot., 26 A.L.R.4th 68 (1983). Thus, § 1-3-103, supra, would seemingly preclude a claim (had such a claim even been made) that the federal or state government had taken a general flight easement by either their declarations of public right or by their use of the airspace.

The Cheyenne Municipal Airport Zoning Ordinance, No. 1969, §§ 1-15, Code Appendix B, was adopted on October 15, 1974. Appellees claim that the declaration of a flight easement in the ordinance was an unconstitutional

taking and within the ten-year limitation provided for by § 1-3-103, W.S.1977. This court does not, however, view the ordinance itself as the actual creator or appropriator of the flight easement, as this was either accomplished by the state and federal statutory declarations or by the repeated physical acts of overflight. Instead, we view the Cheyenne ordinance as an exercise of delegated police powers which was intended to *protect* the easement from activities on the surface. The impact of the police power zoning regulation on the actual and potential surface activities raises certain other legal and constitutional issues, which we will discuss infra.

To conclude this first segment and to preface our discussion of the ordinance as an exercise of the police power, we reiterate our belief that the mere fact of overflight without evidence of impact on the surface, does not create a constitutional claim against either the City of Cheyenne or the airport board for the unconstitutional taking of a flight easement. In addition, the flight easement utilized by airplanes was not taken by the passage of the city zoning ordinance, but by federal and state declarations of public navigability and by repeated overflights which preceded this action by considerably more than the ten years allowed by the statute of limitations pertaining to real property actions. Finally, we hold that the city ordinance is properly viewed as an exercise of police power designed to protect this long-existent flight easement. As such it raises discrete issues of constitutional and legal validity, and we turn now to a discussion of these issues.

The police power can be generally described as a government's ability to regulate private activities and prop-

erty usage without compensation as a means of promoting and protecting the public health, safety, morals and general welfare. See *Weber v. City of Cheyenne*, 55 Wyo. 202, 97 P.2d 667, 670 (1940). Zoning is a particular exercise of the police power. It involves the division of land into zones and within these zones the regulation of both the nature of land usage and the physical dimensions of these uses including height setbacks and minimum area. Airport zoning, as a more refined exercise, deals with the regulation of the type of land activities and their physical dimensions in the immediate vicinity of airports. The general purpose of such airport zoning is to prevent conflicts from emerging between adjacent landowners and their uses and airplane overflights.

There are several potential limitations on the local employment of airport zoning, some of which pose no real problems in this case. In one basic sense, local zoning must be authorized, as even after home rule amendments, municipalities remain largely the creatures of the sovereign state and in need of specific delegations of powers. This is especially so with regard to subjects like airports and their regulation which clearly are matters of statewide significance. The Wyoming legislature, as a means of protecting the state-declared public flight easement passed an enabling act, § 10-5-301, W.S.1977, supra.

Even after enabling legislation is passed and local regulation is authorized, the local grants of power with regard to matters of statewide concern can be preempted by either subsequent state legislation or federal power exercises. With regard to the case at bar, it is clear that the state has not amended its specific delegation of power

to the municipalities, and that the federal regulations continue to insist on obstruction-free approach zones.

Constitutional limits, however, stand apart from the authorization of either federal or state bodies and bind not only the recipients of delegated powers but also the delegators. The federal constitutional limits contained in the Bill of Rights apply directly to federal officials and to agencies, such as the Federal Aviation Agency, and indirectly to the states through the Fourteenth Amendment which, in part, imposes its own direct limits of due process and equal protection on state actions, and also imposes other limits from the federal Bill of Rights which are deemed incorporated into the concept of due process and thus made applicable to the states. State constitutions may add to these limitations and may be more protective of individual liberties. They may not, however, under the dictates of supremacy, be less protective. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980); see generally Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv.L.Rev. 489 (1977).

Both the United States Constitution and the Wyoming Constitution impose due process limitations on exercises of the police powers. The Fifth and Fourteenth Amendments to the United States Constitution and Art. 1, § 6 of the Wyoming Constitution all assert that no person shall be deprived of life, liberty or property without due process of law. In general, Wyoming has, in zoning cases, interpreted its due process provision in a manner parallel to the federal provisions. See e.g. *Board of County Com-*

*missioners of Teton County v. Teton County Youth Services, Inc.*, Wyo., 652 P.2d 400, 414 (1982).

The due process clause has both a procedural and a substantive aspect. *State v. Langley*, 53 Wyo. 332, 84 P.2d 767 (1938). In the case at bar the trial court declared that Cheyenne's airport zoning ordinance failed to meet constitutional standards of substantive due process. For the reasons that follow, we cannot agree with this conclusion.

The constitutional standard of substantive due process, under both United States and Wyoming interpretations, demands that a police power regulation must promote a legitimate public objective with reasonable means. The substantive due process standard of reasonableness is applicable during the initial legislative process and theoretically confines the legislators. The judiciary may, in the context of an actual case, be called on to measure the legislative performance against the constitutional standard. When the legislative enactment lies in the economic and social welfare area, and when there are no suspect criteria or fundamental interests involved, the court will, in testing the enactment, inquire only as to whether the regulation is of debatable reasonableness. In other words, if the court perceives that the legislature had some arguable basis for choosing the end and the means, it will sustain the regulation at least as to compliance with substantive due process. Only when a regulation amounts to an arbitrary deprivation of regulatees' property will it be deemed to violate the dictates of substantive due process. As we said in *Washakie County School District No. One v. Herschler*, Wyo., 606 P.2d 310, 333 (1980), cert. denied 449 U.S. 824, 101 S.Ct. 86, 66 L.Ed.2d 28:

> "When an ordinary [nonfundamental constitutional] interest is involved, then a court merely examines to determine whether there is a rational relationship between a classification * * * and a legitimate state objective."

In the present case the appellees sought, and the trial court apparently granted, a declaration of the ordinance's general or facial invalidity under substantive due process. We conclude, for reasons that follow, that the ordinance does comply with the requirements of substantive due process and that the trial court's contrary conclusion is erroneous.

The legitimate objectives of the police power are loosely characterized as being public in nature and the potential range is very broad. See *Hawaii Housing Authority v. Midkiff*, — U.S. —, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984); *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954). There is no real dispute in this case that the objectives of the Cheyenne airport zoning ordinance are both public and legitimate. The trial judge, in fact, stated:

> "I think there is no question here that private property is sought for the public's good and safety * * *."

As to the means chosen by the Cheyenne council to achieve these objectives, we reiterate that, in the economic and social welfare area and when the ordinance is examined in a general, facial manner, the courts will usually go no further than to ascertain the debatable reasonableness of the legislative choices. See *Snake River Venture v. Board of County Commissioners, Teton County*, Wyo., 616

P.2d 744, 753 (1980). The United States Supreme Court, in dealing with general, facial challenges to local exercises of police power, has sustained the substantive due process reasonableness of a number of facets of local zoning. Thus, in *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303, 54 A.L.R. 1016 (1926), the Court determined that in a general sense, it is constitutionally reasonable and in accord with substantive due process for a local legislature to use comprehensive zoning and its uncompensated restrictions on use and bulk in order to promote the health, safety, morals, and general welfare. In *Gorieb v. Fox*, 274 U.S. 603, 47 S.Ct. 675, 71 L.Ed. 1228, 53 A.L.R. 1210 (1927), the Court upheld the general reasonableness of zoning setbacks and their requirement that portions of plots be left unbuilt. In *Goldblatt v. Town of Hempstead, New York*, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962), the Court upheld the general reasonableness of local zoning restrictions on excava tions below the depth of the water table. In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), the Court sustained the general constitutionality of height limitations that New York City had imposed to protect historic and aesthetic landmarks. See also *Welch v. Swasey*, 214 U.S. 91, 29 S.Ct. 567, 53 L.Ed. 923 (1909).

These Supreme Court precedents do not address the specific issues of airport zoning and its general validity under the standards of substantive due process. We note, however, that they do deal with zoning provisions and restraints on the portions of property that can be physically used. Thus, the United States Supreme Court has sus-

tained the general constitutional reasonableness of restrictions on the depth of activities in the subsoil (*Goldblatt v. Town of Hempstead, New York*, supra), the lateral extent of activities on the surface (*Gorieb v. Fox*, supra, and *Village of Euclid, Ohio v. Ambler Realty Co.*, supra), and the height of activities in the airspace (*Penn Central Transportation Co. v. City of New York*, supra). We hold, therefore, that to the extent that the lower court in the present case purported to enjoin airport zoning in general as contrary to the demands of substantive due process, it was in error.

Substantive due process, with its emphasis on legitimate objectives and rational means, can be explored and applied in a general sense when the reasonableness of the entire ordinance or statute is in question. See e.g. *Village of Euclid, Ohio v. Ambler Realty Co.*, supra. It can also be examined in a specific sense, when the court evaluates the reasonableness of a law as applied to an individual. See *Nectow v. City of Cambridge*, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842 (1928). In a case with some similarities to the one at bar, the Supreme Court sustained the specific reasonableness of a regulation that resulted in the destruction of one party's ornamental cedar trees in order to save local apple crops from cedar rust.

> "The Supreme Court held that the trees could be destroyed by the state without incurring any constitutional duty to compensate the injured landowner. The Court observed that apple production was an important agricultural activity in Virginia while the ornamental cedar trees had only minimal importance. The Supreme Court concluded that '[w]hen forced to such a choice, the state does not exceed its constitutional powers by deciding upon the destruction of one class

> of property in order to save another, which, in the judgment of the legislature, is of greater value to the public.' Like the zoning-property use decisions, this case comports with modern substantive due process analysis by allowing the government to determine how to deal with societal problems without strict judicial review." (Footnote omitted.) J. Nowak, R. Rotunda, J. Young, Constitutional Law 490 (2d ed. 1983).

Though there are examples of cases that deal with substantive due process as applied in particular cases, see e.g. *Penn Central Transportation Co. v. City of New York,* 42 N.Y.2d 324, 397 N.Y.S.2d 914, 366 N.E.2d 1271 (1977), most cases that deal with the particular impact of a land use regulation do so under the provisions of the taking clause. The appellees in the present case made several arguments based upon the taking clause, and the trial court accepted them. We next consider the limitations posed by the taking clause provisions.

The Fifth Amendment to the United States Constitution states in part: "nor shall private property be taken for public use, without just compensation." The Fourteenth Amendment which directly binds the states does not have a taking provision but it was early held that the Fourteenth Amendment due process clause incorporates the concepts and limitations of the taking clause. *Chicago Burlington and Quincy Railroad Co. v. City of Chicago,* 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897). The Wyoming Constitution, Art. 1, § 33, states that "[p]rivate property shall not be taken or damaged * * * without just compensation."

The taking clauses have three possible areas of application. They serve to confine formal exercises of the sov-

ereign power of eminent domain. They apply to cases where governmental action effectively takes or destroys a private interest in property. These situations are described as inverse condemnation. Finally, the clause can cover those situations where the impact of a regulation is deemed to be too severe to be borne without payment of just compensation. We will look with more particularity at the latter two situations as they are alleged to exist in this case.

Inverse condemnation which is generally a physical taking in fact, as opposed to a taking by formal procedure, can involve situations where the government or those acting under government auspices physically occupy all or part of a private estate in land. If such occupation exists, then just compensation is owed for the interest in exclusive possession that has been appropriated. See *Sheridan Drive-In Theatre, Inc. v. State,* Wyo., 884 P.2d 597 (1963). It is signifciant to note that when government actively takes an interest in property through physical occupation, it is usually obligated to pay the fair market value of the interest acquired—without regard to the value of the property remaining to private hands. See *Loretto v. Teleprompter Manhattan CATV, Corp.,* 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), where the Supreme Court found that an ordinance that authorized cable television companies to install receivers on private buildings, amounted to the taking of a compensable easement—without regard to the remaining value of the building to the private owner.

Perhaps the clearest example of an inverse condemnation occurs when the government floods private property

without the prior payment of compensation. See *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166, 13 Wall 166, 20 L.Ed. 557 (1871). Less clear but still covered situations would include intrusions on private property by members of the public pursuant to governmental authorization. Thus, in *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979), the Supreme Court held that the federal government could not require the owners of a private marina to allow the public free access without the payment of just compensation.

Airplane overflights can constitute inverse condemnation but as noted earlier, the courts have generally not found a taking from mere passage through the airspace. Rather, as held in *United States v. Causby*, supra, 328 U.S. 256, 66 S.Ct. 1062, flights over private land are not deemed a taking unless so low and so frequent as to be a direct and substantial interference with the use and enjoyment of land. See Annot, 57 L.Ed.2d 1254, 1260-1261 (1978). As noted, the appellees in this case have not demonstrated any evidence of substantial interference with the use and enjoyment of the surface. There is, therefore, no basis for an allegation of inverse condemnation due to overflight.

We turn now to a discussion of the zoning ordinance and whether its regulatory impact on appellees' land amounts to a taking. We have previously discussed our conclusion that the municipal ordinance does not itself amount to the compensable taking of an affirmative easement in the airspace. Rather, the flight easement was initially taken by federal and state declaration and by actual uses, and the ordinance serves merely to protect this affirmative easement. The appellees, however, have also argued that the protective effect of the zoning ordinance is

to create a *negative* easement without compensation. A negative easement theoretically involves only a servient tenement and not a dominant one. The owners of such servient tenements would, by virtue of the negative easement, be precluded from the full spatial usage of their property. The holder of a negative easement has, by virtue of such an interest, no right to active use; rather the holder can merely insist that the burdened party refrain from certain uses or uses in certain areas.

In the present case, the appellees insist that their property is burdened by a negative easement because they are precluded from building or allowing their trees to extend above the ordinance's height limit. The appellees assert that such negative easements represent property interests taken by the government even though the government is not an active user and that such takings require compensation without regard to the remaining value of the regulated plot.

The Supreme Court of the United States chooses not to view zoning setbacks and height limits as the creation of compensable negative easements. This argument was raised in *Penn Central Transportation Co. v. City of New York,* supra, and the majority replied that extensive precedent precluded this argument.

> "These cases [*Welch v. Swasey, Goldblatt v. Hempstead, Gorieb v. Fox,* supra] dispose of any contention that might be based on *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922), that full use of air rights is so bound up with the investment-backed expectations of appellants that governmental deprivation of these rights invariably—i.e., irrespective of the impact of the restriction on the value of the parcel as a whole—constitutes a 'taking'.

> Similarly, *Welch, Goldblatt,* and *Gorieb* illustrate the fallacy of appellants' related contention that a 'taking' must be found to have occurred whenever the land-use restriction may be characterized as imposing a 'servitude' on the claimant's parcel.'' 438 U.S. at 131 n. 27, 98 S.Ct. at 2662 n. 27.

Rather, the Supreme Court views the situation where a landowner is restrained in his use of one spatial area of his property—his airspace, side yards or subsoil—as merely one species of use regulation. The Court thus presumes that no actual property in these cases had been appropriated by the government and an unconstitutional taking will be found only if the regulation fails the balancing test first articulated in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322, 28 A.L.R. 1321 (1922).

Under Justice Holmes' reasoning in *Pennsylvania Coal Co. v. Mahon,* the taking clause application was expanded beyond the formal eminent domain and inverse condemnation of physical interests in property. Under Pennsylvania Coal Company's balancing test, a regulation can also be deemed invalid as an uncompensated taking if it goes too far in its restrictions on the *use* of property. This situation can be clearly differentiated from cases where the government appropriates actual easements as there are no necessary physical or spatial aspects. Instead, the regulation's impact on *usage* is the key.

The taking through excessive use regulation is also differentiated from cases of formal or inverse condemnation of actual property interests in that, when the government takes an actual easement, it must pay 'he fair market value of the interest taken, regardless of the value of the remaining plot. See *Loretto v. Teleprompter Manhat-*

*tan CATV, Corp.*, supra, 455 U.S. 419, 102 S.Ct. 3164. In the excessive regulation cases, the remedy, where the regulatory impact has gone too far, has generally been limited to a declaration of unconstitutionality and an injunction. See *Penn Central Transportation Co. v. City of New York*, supra, 42 N.Y.2d 324, 397 N.Y.S.2d 914, 366 N.E.2d 1271.

The application of the balancing test involves a comparison of the substantiality of the public interest with the impact upon the individual. Though such a comparison can conceivably be made when the general constitutionality of a regulation is questioned, see *Pennsylvania Coal Co. v. Mahon*, supra, the vast bulk of regulatory taking cases have involved instances of specific application. To the extent that the appellees in the present case have alleged an unconstitutional regulatory taking, it is clear that their focus is on the specific application of the regulation to their plot and not on all the impacts that might stem from the entire ordinance.

The balancing test and the components of comparison are not rigidly fixed. However, certain relevant factors can be identified and certain principles as to how these factors should be treated have been established in the Supreme Court opinions.

In assessing the substantiality of the government interest, the courts may be concerned with whether the regulation can be characterized as designed to prevent a harm (the theoretical province of the police power) or intended to secure a benefit (the theoretical province of eminent domain). If the regulation is deemed to be directed at a potential harm, the courts are then concerned with the harm's imminence, its severity, and how likely the law

is to be successful in preventing the harm. See J. Nowak, R. Rotunda, J. Young, Constitutional Law 492; see also *United States v. Caltex,* 344 U.S. 149, 73 S.Ct. 200, 97 L.Ed. 157 (1952); and *United States v. Central Eureka Mining Company,* 357 U.S. 155, 78 S.Ct. 1097, 2 L.Ed.2d 1228 (1958), where the regulations were reasonably designed to prevent imminent, severe wartime harms. The substantial governmental interest in the regulations thus permitted a high degree of impact on private property without exceeding the taking clause limits.

The Supreme Court has clearly stated that the impact to be considered and balanced is the impact of the regulation on the plot as a whole. The impact of the regulation on discrete segments is not relevant. In *Penn Central Transportation Co. v. City of New York,* supra, the Court said:

> " 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the 'landmark site.' " 438 U.S. at 130-131, 98 S.Ct. at 2662-63.

In assessing the impact of the regulation on the plot as a whole, the more relevant of the elements a restrained landowner can show are: the near-complete frustration of investment-backed expectations; the diminution of the property's market value as a result of regulation; and, perhaps most significantly, the absence of a reasonable remaining economic use. See *Penn Central Transporta-*

*tion Co. v. City of New York*, supra, 438 U.S. at 127-137, 98 S.Ct. at 2660-2666. The plaintiff has a burden of establishing these claims. If he fails to do it, the court will not presume the impact. In describing the result in *Goldblatt v. Hempstead*, supra, the Court in *Penn Central Transportation Co. v. City of New York*, supra, said:

> "*Goldblatt v. Hempstead*, supra, is a recent example. There, a 1958 city safety ordinance banned any excavations below the water table and effectively prohibited the claimant from continuing a sand and gravel mining business that had been operated on the particular parcel since 1927. The Court upheld the ordinance against a 'taking' challenge, although the ordinance prohibited the present and presumably most beneficial use of the property and had, like the regulations in Miller and Hadacheck, severely affected a particular owner. The Court assumed that the ordinance did not prevent the owner's reasonable use of the property since the owner made no showing of an adverse effect on the value of the land. Because the restriction served a substantial public purpose, the Court thus held no taking had occurred." 438 U.S. at 126-127, 98 S.Ct. at 2660-61.

In addition, if the plaintiff fails to utilize available administrative procedures such as those allowing variances, the courts may also find that impact has not been clearly shown. *Penn Central Transportation Co. v. City of New York*, supra, 438 U.S. at 137, 98 S.Ct. at 2665-66.

In the case at bar, the appellees have alleged a taking pursuant to the airport zoning ordinance's height limit as to both the cottonwood tree presently exceeding the height limit, and the future trees or possible residential additions which may be affected. As previously noted, the uniform treatment of this claim precludes the characterization of

such restricted plot usage as the compensable appropriation of a property interest in the airspace. Therefore, this facet of appellees' claim depends on application of the balancing test and a comparison of the substantiality of the government interest and the impact on the plot as a whole.

In assessing the impact on the plot as a whole, it is noteworthy that the Rogerses made no attempt to use the variance procedure contained in § 7(d) of the zoning ordinance. The municipality might, if appellees had made the necessary showings, have granted a variance for the tree and for possible future uses. In such an event, the regulatory impact of the ordinance would have been alleviated. Appellees' failure to use the variance provision denies the municipality an administrative means of protecting its ordinance from constitutional challenges and of fashioning individual relief in accord with both justice and the spirit of the ordinance. See *Baggett v. City of Montgomery*, 276 Ala. 166, 160 So.2d 6 (1964).

It is also noteworthy that appellees purchased the zoned property after the ordinance had been in effect for almost two years, a fact that indicates it unlikely that appellees have suffered loss of "distinct, investment-backed expectations." *Penn Central Transportation Co. v. City of New York*, supra, 438 U.S. at 127, 98 S.Ct. at 2660-2661. Finally, the required existence of impact does not appear, for appellees' residential usage of the plot was not noticeably affected until 1982 when the height of a single tree became legally problematic.

With regard to this particular cottonwood, appellees claim that the ordinance as applied will result in a loss of $2,064. It seems likely that the loss would have been sub-

stantially less if appellees had complied with the ordinance in 1976 and periodically trimmed the tree and not allowed it to substantially exceed the allowed height. It also is apparent that this figure is far less than the value of the plot for residential purposes.

In summation, the cases involving taking, including those cited by the appellees for the proposition that the particular application of airport zoning effects a taking, have almost always involved situations of substantial or nearly total restriction of plot usage or value. The appellees have failed to demonstrate such a significant impact as to counterbalance the significant public interest in protecting the airport flight path.

For the reasons enunciated, the judgment of the trial court is reversed.

## APPENDIX C

### ORAL COMMENT OF THE HONORABLE PAUL GALEOTOS, MUNICIPAL COURT JUDGE FOR THE CITY OF CHEYENNE

OCTOBER 28, 1986

(p. 39) THE COURT: With regard to the Motion challenging the ordinance based on constitutional grounds in violation of the Fifth and 14th Amendments, first of all, let me indicate that it's been the procedure in this Court, as long as I've been sitting here, to take the view that a Statute ordinance should be challenged and decided and litigated in a Court of record. I believe strongly that Municipal Courts are (p. 40) courts of limited jurisdiction. They're courts that are not created constitutionally. In fact, in our minor court rules, they're indicated we're not really even courts of record. I think it goes on to say, Rule 23, that we don't have seals, we don't permanently keep records of proceedings, do not have recording officers. They are courts of limited jurisdiction, and further goes on to say there was no strong presumption of the veracity of the records. So, it's been my view, and I believe it's a correct view, that the District Courts for the State of Wyoming, Supreme Court for the State of Wyoming, are the proper forms for ordinances and Statutes to be determined as to constitutionality.

I agree with Mr. Phelan that if it's, you know—that opportunity affords itself, maybe a limited court—jurisdiction court should consider it, but it seemed to me that those would be very, very limited amount of cases, that there's any opportunity for District Court or Supreme Court to review those proceedings, it should be done there.

I think I've indicated in reviewing the *Cheyenne Airport Board case versus Terry Rogers,* I think that's cited as 707 P.2nd 717, that even, I think, the defendant's view, when they sought to declare (p. 41) that appeared they felt District Court was the proper proceedings. I mean, we didn't have a declaratory judgment action brought in Municipal Court to declare those ordinances unforceable and unconstitutional. So, I think the record's clear, that that's the proper form, and the Supreme Court has ruled on them. I understand Mr. Phelan's arguments, and he's made them for the record, that if, in fact, they're—I guess they will have an opportunity to review that decision and make any appropriate changes if they feel it necessary.

So, in summary, I'm going to rule that the Motion be denied based upon the constitutional ground and challenge to the ordinances. I'd like to take maybe a ten-minute recess so that all parties will have an opportunity, and then, we'll proceed with the trial on the merits. So, Court will stand in recess for ten minutes.

* * *

## APPENDIX D

THE STATE OF WYOMING
FIRST JUDICIAL DISTRICT

Edward L. Grant (SEAL) Laramie County Courthouse
Judge Cheyenne, Wyoming
82001

January 26, 1987
(Filed Jan. 28, 1987)

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RE: Rogers v. City of Cheyenne; Docket No. 18-168

Dear Counsel:

The Court has reviewed the record and briefs. I believe that for the reasons stated in the Federal District Court's Order and Memorandum of December 18, 1986, #C86-0276-B, that *Cheyenne Airport Board v. Rogers,* 707 P.2d 717, 721 (Wyo. 1985) is dispositive. Appellant contends that that case is to be ignored by this Court because of the alleged lack of jurisdiction of the Wyoming Supreme Court in that case. I cannot accept that premise and therefore find that the case is controlling and requires a dismissal of this appeal. Ms. Tabor will please submit a form of order at her early convenience. I do not find in the file this Court's Order Staying Enforcement of

Judgment but recall entering it. That order will be dissolved as of February 5, 1987.

Very truly yours,

/s/ Edward L. Grant
Edward L. Grant
District Judge

ELG/adp

---

IN THE DISTRICT COURT
IN AND FOR THE FIRST JUDICIAL DISTRICT
LARAMIE COUNTY, STATE OF WYOMING

Docket No. 18-168

TERRY ROGERS,

Appellant,

vs.

CITY OF CHEYENNE,

Appellee.

ORDER DISMISSING APPEAL

(Filed February 3, 1987)

THIS MATTER having come before the Court on Appellant's Notice of Appeal filed November 18, 1986, and the Court having reviewed the record and the briefs submitted by the parties and the Court having issued a letter decision on January 26, 1987, in which the Court found that the Appellant's appeal should be dismissed based on the reasons stated in the Federal District Court's Order and Memorandum of December 18, 1986, #C86-0276-B and

that *Cheyenne Airport Board v. Rogers*, 707 P.2d 717, 721 (Wyo. 1985) is controlling;

IT IS HEREBY ORDERED as follows:

1. That the Appellant's appeal be and hereby is dismissed.

DATED this 30 day of January, 1987.

/s/ Edward L. Grant
District Judge

APPROVED AS TO FORM:

Bernard Q. Phelan

## APPENDIX E

IN THE SUPREME COURT
OF THE
STATE OF WYOMING

| | | |
|---|---|---|
| TERRY ROGERS, | ) | |
| | ) | |
| Appellant, (Defendant) | ) | |
| | ) | |
| v. | ) | No. 87-82 |
| | ) | |
| CITY OF CHEYENNE, | ) | |
| | ) | |
| Appellee. (Plaintiff) | ) | |

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

(Filed Jan. 8, 1988)

NOTICE IS HEREBY GIVEN that TERRY ROGERS, appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Wyoming, affirming the order of the lower court, entered in this action on December 29, 1987.

This appeal is taken pursuant to 28 U.S.C. 1257(2).

DATED this 7th day of January, 1988.

TERRY ROGERS, Appellant

/s/ By: Bernard Q. Phelan
Bernard Q. Phelan
Attorney for Appellant
2020 Carey Ave., Suite 402
Cheyenne, WY 82003-1841

PROOF OF SERVICE

I, Bernard Q. Phelan, attorney for TERRY ROGERS, appellant herein, depose and say, that I served a copy of the foregoing NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES on Honorable Joseph Meyer, Attorney General of the State of Wyoming, State Capitol, Cheyenne, Wyoming 82002 and Mr. Vincent Horn, Cheyenne City Attorney, Municipal Building, 2101 O'Neil Avenue, Suite 308, Cheyenne, Wyoming 82001, by depositing the same in the United States mail postage prepaid, this 7th day of January, 1988.

Affiant further states that all parties who are required to be served have been served as set forth above.

DATED this 7 day of January, 1988.

/s/ Bernard Q. Phelan
Bernard Q. Phelan

STATE OF WYOMING, )
) ss.
COUNTY OF LARAMIE. )

Subscribed and sworn to before me by Bernard Q. Phelan this 7th day of January, 1988.

/s/ Carol Wiggins
Notary Public

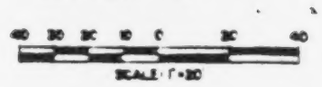
My Commission Expires: October 6, 1991

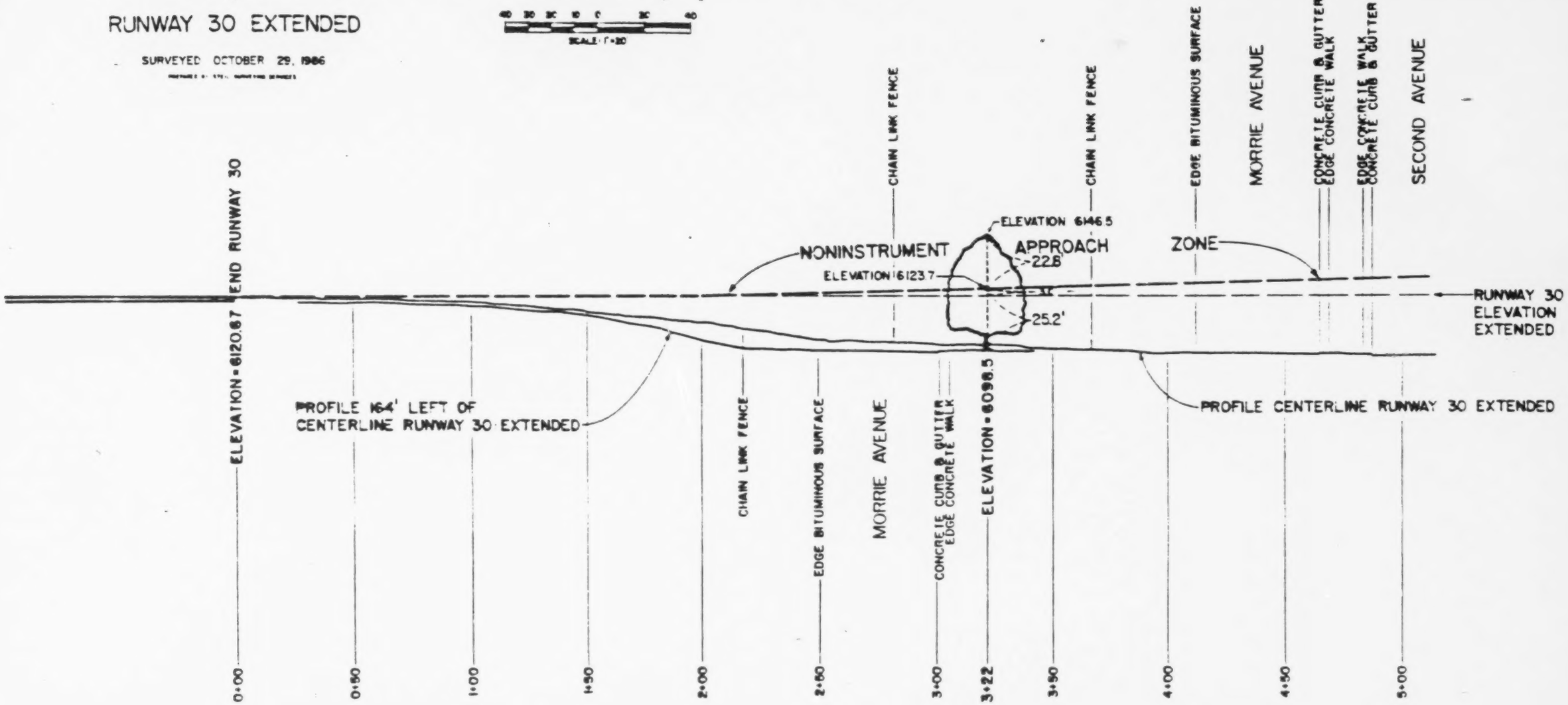
## APPENDIX F

PROFILE VIEW
OF
RUNWAY 30 EXTENDED

SURVEYED OCTOBER 29, 1986

EXHIBIT - "A"



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Supreme Court, U.S.
FILED
APR 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1462

In The
# Supreme Court of the United States
October Term, 1987

TERRY ROGERS,

*Appellant,*

vs.

CITY OF CHEYENNE,

*Appellee.*

**ON APPEAL FROM THE SUPREME COURT OF WYOMING**

## APPELLEE'S MOTION TO DISMISS

R. WALTER CONNELL
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DATE: April, 1988

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## QUESTION PRESENTED

The question in this case is whether the City of Cheyenne Municipal Airport Zoning Ordinance, providing a height limitation in a non-instrument approach zone to the Cheyenne Municipal Airport, is a violation of the Fifth Amendment of the United States Constitution as a taking of private property for public use without just compensation.

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## MOTION TO DISMISS

Pursuant to Rule 16.1, the Appellee, City of Cheyenne, moves to dismiss the appeal herein on the ground that the appeal does not present a substantial federal question, and on the ground that the principal of res judicata bars consideration of the appeal.

———o———

## STATUTORY PROVISIONS INVOLVED

In pertinent part, 28 United States Code Section 1257 provides that:

Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity.

Other pertinent, constitutional and statutory provisions have been supplied to the court by the Appellant in his Jurisdictional Statement.

———o———

## STATEMENT OF THE CASE

In 1974, the City of Cheyenne adopted a municipal airport zoning ordinance which restricted the height of

structures and trees within the zone. The purpose of the ordinance was to protect the citizens of Cheyenne and the flying public from dangerous obstructions in the flight approaches to the Cheyenne airport. After the enactment of the ordinance, the Appellant purchased residential property within the zone.

During July 1982, airport officials notified Appellant that a tree on his property was not in conformance with the airport zoning ordinance. Appellant refused to bring the tree into conformity and instead filed an action in state court alleging that the ordinance took an easement in his airspace without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution. The Wyoming Supreme Court upheld the constitutionality of the ordinance concluding that the ordinance did not effect an unconstitutional taking *Cheyenne Airport Board v. Rogers*, 707 P. 2d 717 (1985).

Appellant appealed that Wyoming Supreme Court decision. This court dismissed the appeal for want of a substantial federal question. *Rogers v. Cheyenne Airport Board*, — U.S. —, 106 S.Ct. 1961, 90 L. Ed. 2d 647 (1986). Appellant then filed an action in federal district court, under 42 U.S.C., 1983, seeking a declaratory judgment, injunction and damages. That case was dismissed as being barred by "[p]rinciples of full faith and credit, res judicata . . . . comity, equity and federalism." *Rogers v. City of Cheyenne*, No. C86-0276-B (D. Wyo. Dec. 9, 1986).

On June 18, 1986, the City of Cheyenne filed a criminal complaint against Appellant alleging a violation of the airport zoning ordinance by allowing a tree to grow into and remain in the restricted zone. Appellant was

convicted by the Municipal Court. Appellant appealed his conviction, by again challenging the constitutionality of the airport zoning ordinance. The Wyoming Supreme Court, in *Rogers v. City of Cheyenne*, 747 P. 2d 1137 (1987), for the second time, held that the airport zoning ordinance did not effect unconstitutional taking and further held that there was sufficient evidence that Appellant was under a duty to trim the tree to support his conviction.

Appellant brings this appeal once again, challenging the constitutionality of Cheyenne's airport zoning ordinance by alleging that the ordinance constitutes a taking without just compensation.

---

## ARGUMENT

### 1. THIS CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

The Wyoming Supreme Court, for the second time, correctly applied standards and principles set forth by this Court. The Wyoming Court in this case, as in the prior appeal, relied on the decisions of this Court in the cases of *United States v. Causby*, 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946) and *Griggs v. County of Allegheny, Pennsylvania*, 369 U.S. 84, 82 S. Ct. 531, 7 L. Ed. 2d 585 (1962) in determining that surface owners have no cause of action in trespass nor constitutional claim for uncompensated taking, unless the exercise of the flight easement by aircraft produces nuisance or some substantial impact on the surface. Further, the Wyoming Supreme Court in its prior decision determined that the dem-

onstrated purpose of the ordinance was for the promotion of the public's safety and general welfare and that the ordinance was in accord with substantive due process and the principles of the case of *Village of Euclid v. Ambler Realty Co.*, 365 U.S. 359 (1926), *Cheyenne Airport Board v. Rogers*, 707 P. 2d 717 (Wyo. 1985) at 727.

It should be noted that Appellant has never demonstrated in any action related to this appeal, evidence of substantial interference with or restriction of the use and enjoyment of the Appellant's property as a whole. The record does not contain any evidence of substantial impact on the surface of Appellant's property. The record does not contain evidence demonstrating any significant economic impact of the ordinance upon Appellant, nor does it demonstrate an interference with any investment backed opportunities of the Appellant. Therefore, the Wyoming Court properly upheld the height restrictions in accordance with the principles established by this Court in the cases of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978), *Village of Euclid*, *Griggs* and *Causby*.

## 2. THE PRINCIPLES OF NOLLAN v. CALIFORNIA COASTAL COMMISSION DO NOT INVALIDATE THE HOLDING OF THE WYOMING SUPREME COURT

Appellant suggests that the recent decision of this Court in *Nollan v. California Coastal Commission*, — U.S. —, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987), wherein this court held that the California Coastal Commission could not require a public easement across the surface of a landowner's beachfront property as a condition for a building

permit, invalidates the holding of the Wyoming Court below. However, the Wyoming Court considered the *Nollan* decision and properly noted that the *Nollan* holding and the basis for that holding were not applicable to the zoning ordinance in question. *Rogers v. City of Cheyenne,* 747 P. 2d 1137, 1139 (1987). The Wyoming Court in *Rogers* at 1139 also correctly pointed out that the airport zoning ordinance did not create or appropriate the easement for flight over Appellant's property, but instead was a regulation on actual and potential surface uses.

### 3. THE PRINCIPLE OF RES JUDICATA BARS CONSIDERATION OF THIS APPEAL

Appellant is seeking the same remedy from this Court as he sought in *Rogers v. Cheyenne Airport Board,* 90 L. Ed. 2d 64 (1986) supra. Appellant makes no new claims and he raises the same issues in this appeal that were raised in the prior appeal to this Court. In fact, the Appellant's arguments in his Jurisdictional Statement for this appeal are identical to the arguments which were made in the Jurisdictional Statement in *Rogers v. Cheyenne Airport Board,* 90 L. Ed. 2d 64 (1986). Because the remedy sought and the claims, issues and arguments are the same as in *Rogers v. Cheyenne Airport Board,* 90 L. Ed. 2d 64 (1986), wherein this court dismissed the appeal because of lack of a substantial federal question, this appeal should also be dismissed under the principle of res judicata. Res judicata precludes relitigation of claims and defenses that were raised or could have been raised in a prior proceeding. *Allen v. McCurry,* 449 U.S. 90, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980).

When applying the principle of res judicata to Appellant's action for injunction and declaratory judgment concerning Cheyenne's airport zoning ordinance, Chief Judge Clarence Brimmer, of the United States District Court for Wyoming, aptly pointed out the need for application of res judicata when he stated:

> "This Court is the fourth in which defendants have been required to defend against plaintiff's claims. Considerable judicial time has been expended in this process. Plaintiff's received several bites at the apple, and it is time to end this litigation." *Rogers v. City of Cheyenne*, No. C86-0276-B (D. Wyo. Dec. 9, 1986)

Further judicial time by this Court should not be spent on this appeal and the principle of res judicata should be applied.

———o———

## CONCLUSION

The decision of the Wyoming Supreme Court in this appeal was correct and based upon the proper application of settled principles of law articulated by this Court. No substantial federal question is present in this appeal and as a result, the appeal should be dismissed. The principle of res judicata also requires the dismissal of this appeal.

Respectfully submitted,

R. Walter Connell
*Attorney for Appellee*
*City of Cheyenne*
125 West Mendenhall
Bozeman, MT 59715
(406) 587-7496

DATE: April, 1988

## APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

TERRY ROGERS and BRENDA ROGERS,

Plaintiffs,

vs.

CITY OF CHEYENNE and
CHEYENNE AIRPORT BOARD,

Defendants.

### ORDER GRANTING MOTION TO DISMISS

This matter came before the Court on defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) and for costs and attorney fees pursuant to Fed. R. Civ. P. 11. The Court, having heard the arguments of counsel, having reviewed the pleadings, and being fully advised in the premises, FINDS and ORDERS as follows:

This is an action for monetary, injunctive and declaratory relief under 42 U.S.C. § 1983. Principles of full faith and credit, res judicata and of equity, comity and federalism bar this action. The Court consequently grants defendants' motion to dismiss.

The City of Cheyenne adopted a municipal airport zoning ordinance in 1974. The purpose of the ordinance is to eliminate dangerous obstructions near the airport's runways and flight approaches. To achieve this goal, the ordinance restricted the height of structures and trees within a specified zone. Plaintiffs purchased residential property within the zone two years after enactment of the ordinance. The City later demanded that the plaintiffs

comply with the zoning ordinance by trimming a large tree located on their property.

Plaintiffs filed an action in state court alleging that the ordinance took an easement in plaintiffs' airspace without just compensation in violation of the fifth and fourteenth amendments to the United States Constitution, as well as provisions of the Wyoming Constitution. Wyoming's Supreme Court upheld the constitutionality of the ordinance, holding that plaintiffs lost no compensable airspace. *Cheyenne Airport Bd. v. Rogers*, 707 P.2d 717, 721 (Wyo. 1985), *appeal dismissed*, 90 L.Ed.2d 647 (1986). Plaintiffs appealed as of right to the United States Supreme Court. The Court dismissed for a want of a substantial federal question. *Rogers v. Cheyenne Airport Bd.*, 90 L.Ed.2d 647 (1986). Plaintiffs brought this action under 42 U.S.C. § 1983. They seek damages for alleged constitutional violations, an order enjoining enforcement of the ordinance, and a declaration that the ordinance unconstitutionally takes private property without just compensation.

Principles of full faith and credit, res judicata, and of comity, equity and federalism bar this case. Every court within the United States must give full faith and credit to judicial proceedings in other forums. 28 U.S.C. § 1738. The extent to which full faith and credit bars subsequent litigation depends on common law principles of res judicata. *Halvey v. Halvey*, 330 U.S. 610, 615 (1947). *See generally* Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 Colum. L. Rev. 1 (1945); Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretive Reexamina-*

*tion of the Full Faith and Credit and Due Process Clauses (Part 1)*, 14 Creighton L. Rev. 499 (1981). Res judicata precludes relitigation of claims and defenses that were raised or could have been raised in a prior proceeding. *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Collateral estoppel makes a prior determination of an issue binding in a subsequent proceeding by precluding relitigation of issues actually decided in an earlier action. *Montana v. United States*, 440 U.S. 147, 153 (1979). These doctrines apply in § 1983 actions. *Allen v. McCurry*, 449 U.S. at 105 (collateral estoppel applies to § 1983 actions); *Migra v. Warren City School Dist. Bd. of Education*, 465 U.S. 75, 85 (1984) (prior state court actions given res judicata effect in § 1983 actions). All of plaintiffs' claims in this action were raised or could have been raised in the state courts. The doctrine of res judicata therefore precludes plaintiffs' claims.

The doctrine's rationale supports this result. Res judicata is intended to relieve parties of the cost and vexation of multiple litigation, to conserve judicial resources, to avoid inconsistent judgments and to end litigation. *Montana v. United States*, 440 U.S. 147, 153-54 (1979). This Court is the fourth in which defendants have been required to defend against plaintiffs' claims. Considerable judicial time has been expended in this process. Plaintiffs received several bites at the apple, and it is time to end this litigation.

Plaintiffs argue that res judicata should not apply in this case. First, they contend that the state courts lacked subject matter jurisdiction over this claim. Second, they urge that the state courts denied them a full and fair

opportunity to litigate. The basis for each argument is a statement by the Wyoming Supreme Court noting that plaintiffs failed to seek a variance from the zoning ordinance. *See Cheyenne Airport Bd. v. Rogers*, 707 P.2d at 723, 732. Plaintiffs concede the accuracy of the court's statement but contend that their own failure to seek a variance deprived the state courts of jurisdiction and voided all proceedings in this case.

As authority they cite *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 87 L.Ed.2d 126 (1985) (plurality opinion). In that case, the Court concluded that a landowner's failure to seek a variance from a zoning ordinance and to utilize procedures for obtaining just compensation rendered the landowner's claim not ripe for judicial review. *Id.* at 138, 139. Plaintiffs argue that, because they failed to seek a variance from the zoning ordinance, the case was premature and the Wyoming courts lacked jurisdiction.

A closer examination of *Williamson* shows, however, that plaintiffs' reliance on that case is misplaced. First, *Williamson* is inapposite. That case was tried before a jury, which found that the landowner would be deprived of economic benefit from its land due to local land use regulations. The Court, however, reasoned that the failure to seek a variance showed that the decision of the local planning commission was not final. Therefore, the jury could not possibly find that the landowner had been denied the reasonable use of its property. *Id.* at 142, 143. In contrast, the Wyoming Supreme Court held that plaintiffs had not been deprived of a compensable property interest. *Cheyenne Airport Bd. v. Rogers*, 707 P.2d at 725.

Whether or not plaintiffs sought a variance is irrelevant to the determination that they possessed no property interest. Unlike *Williamson* this action presented a concrete case of final governmental action.

Second, Wyoming does not fully accept federal justiciability doctrines. *See* Keiter, *An Essay on Wyoming Constitutional Interpretation*, 21 *Land & Water L. Rev.* 527, 533-35 (1986). *Williamson* was tried in a federal court. Federal courts are courts of limited jurisdiction subject to the case or controversy limitations of Article III of the United States Constitution. Federal courts may only adjudge rights of litigants involved in actual controversies. *Valley Forge Christian College v. American United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). In contrast, state courts are not bound by the case or controversy requirements of Article III absent some analogous state constitutional provision. Instead of the enumerated cases or controversies of Article III, the Wyoming appellate and district are courts of general jurisdiction over all "causes both at law and in equity." Wyo. Const. art. 5, §§ 2, 10. Moreover, Wyoming's view of justiciability is broader than Article III. Wyoming, for example, excepts matters of sufficient public importance from the mootness doctrine. *Washakie County School Dist. No. One v. Herschler*, 606 P.2d 310, 318 (Wyo. 1980), *cert. denied sub. nom. Hot Springs County School Dist. No. One v. Washakie County School Dist. No. One*, 449 U.S. 824 (1980). *C.f. Defunis v. Odegaard*, 416 U.S. 312, 316 (1974) (federal mootness doctrine does not recognize a "public importance" exception). The Wyoming courts also have conferred taxpayer standing in

the face of contradictory federal precedent. *Springs v. Clark*, 14 P.2d 667, 668 (Wyo. 1932). *C.f. Frothingham v. Mellon*, 262 U.S. 447 (1923) (denying taxpayer standing). Finally, the Wyoming court has not used politically sensitive cases to read a political question doctrine into the state constitution. *See Brimmer v. Thomson*, 521 P.2d 574 (Wyo. 1978); *Washakie County School Dist. No. One v. Herschler*, 606 P.2d 310, 318 (Wyo. 1980), *cert. denied*, 449 U.S. 824 (1980). *C.f. Baker v. Carr*, 369 U.S. 186 (1962). For these reasons, the Court concludes that the Wyoming Supreme Court did possess jurisdiction and that its holding is entitled to full faith and credit.

Plaintiffs argue, however, that res judicata still cannot apply, because the state courts denied them a full year and fair opportunity to litigate. They assert that the Wyoming Supreme Court's observation that plaintiffs failed to seek a variance was not supported by any evidence in the record or raised in counsels' briefs or arguments. Plaintiffs contend that the Wyoming court's statement denied them due process of law. This argument is meritless.

First, the Wyoming Supreme Court's comment is harmless. Plaintiffs' counsel admitted the truth of the statement in oral argument before this Court. Plaintiffs are thus in the awkward position of contending that they were prejudiced by the truth. Moreover, the statement had an inconsequential effect on the outcome of the case. The Wyoming court simply did not rely on this fact in concluding that plaintiffs lost no compensable airspace.

Second, plaintiffs were not denied a full and fair opportunity to litigate. Res judicata may be inappropriate

where a party was denied a fully and fair opportunity to litigate in the state courts. *Allen v. McCurry*, 449 U.S. at 101; *Haring v. Prosise*, 462 U.S. 306, 313 (1983). The courts must consider whether state substantive law is facially invalid or whether state procedural law frustrates constitutional litigation. *Allen v. McCurry*, 449 U.S. at 100-101. Scholars point to several additional factors the courts should weigh. First, state issue and claim preclusion rules should apply if the § 1983 plaintiff initially selected a state forum. In such cases, giving res judicata effect to prior state court judgments does not frustrate the intent of § 1983. The second factor is whether relitigation in the federal courts undermines respect for state court judgments. Denying preclusive effect to earlier state court judgments may be appropriate where § 1983 litigation presents new claims or issues in the federal courts or where the federal constitutional issues were tangential to the state court proceedings. A third consideration is whether the state courts adequately and fairly considered the federal issues. Giving res judicata effect to a state court constitutional decision may be inappropriate if the state court had an institutional interest in the outcome of the litigation or if the §1983 litigation relates not to the issue originally in dispute but to the process by which the state court decision was reached. Fourth, claim preclusion is justified where the state court did not apply federal law to factual issues. Finally, preclusion may be appropriate where the remedy sought in federal court is substantially the same as that sought in the state courts. *See*, Smith, *Full Faith and Credit and Section 1983: A Reappraisal*, 63 N.C. L. Rev. 59, 112-17 (1984); McCormack, *Federalism and Section 1983: Limitations on Judicial En-*

*forcement of Constitutional Claims (Part II)*, 60 *Va. L. Rev.* 250, 276-77 (1974); Torke, *Res Judicata in Federal Civil Rights Actions Following State Litigation*, 9 *Ind. L. Rev.* 543, 561-68 (1976); Vestal, *State Court Judgment as Preclusive in Section 1983 Litigation in a Federal Court*, 27 *Okla. L. Rev.* 185, 187-211 (1974).

This is not a case of a party haled into court, forced to litigate constitutional claims against his will, or compelled without his consent to accept the state courts' determination of those claims. Plaintiffs chose to litigate in the state courts. They proceeded through each level of the Wyoming courts and to the United States Supreme Court. Their appeal to that Court was dismissed for want of a substantial federal question. Plaintiffs now urge this Court to declare those proceedings nugatory or to embark on its own appellate review of the Wyoming Supreme Court's decision. Plaintiffs are shopping for a new forum after losing in state court and before the United States Supreme Court. Claim preclusion is appropriate in these circumstances.

Other reasons justify applying res judicata. This Court would undermine the judgment of the Wyoming Supreme Court by providing, in effect, an appellate forum for plaintiffs' claims. New claims or issues are not presented by the § 1983 litigation. Nor were the federal constitutional issues tangential to the state court proceedings. Second, the state courts adequately and fairly considered the federal issues. They possessed no institutional interest in the outcome of the litigation. The instant litigation does not challenge the state court's decision-making process. It raises the same issues originally in dispute.

Third, the remedy sought in federal court is substantially the same as the remedy sought in the state courts.

Finally, principles of comity, equity and federalism require dismissal of this action. *See Younger v. Harris*, 401 U.S. 37, 43-44 (1971). The Constitution obligates the state courts to uphold federal law. *Allen v. McCurry*, 449 U.S. at 105. This Court has no reason to assume that they failed to do so in this case. The co-equal positions of the state and federal courts is "one of the happy incidents of the federal system." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1931) (Brandeis, J., dissenting). Comity and federalism indicate that the Court should abstain from deciding plaintiffs' claims. Equity dictates the same result. Plaintiffs acquired their property two years after the airport zoning ordinance was enacted. They therefore had ample notice of the ordinance and its effect on their property. Plaintiffs' tree may endanger air traffic. In the interest of public safety the Court must be guided by the policy of ending litigation.

Defendants also seek costs and attorney fees. They urge that plaintiffs' claim is groundless and unwarranted by existing law or a good faith argument for the extension, modification or reversal of existing law. This action, however, raises complex issues concerning the interaction between state and federal courts. These problems are not susceptible to ready determination, and the Court cannot find that the claim was totally unwarranted or interposed merely to harass. It is therefore

ORDERED that the defendants' motion to dismiss be, and the same hereby is, granted and all of plaintiffs'

claims against the City of Cheyenne and the Cheyenne Airport Board are hereby dismissed. It is further

ORDERED that defendants' motion for costs and attorney fees be, and the same hereby are, denied.

Dated this 9th day of December, 1986.

CLARENCE A. BRIMMER
CHIEF JUDGE,
UNITED STATES DISTRICT
COURT

Supreme Court, U.S.
FILED
APR 22 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1462

In The
# Supreme Court of the United States
October Term, 1987

—o—

TERRY ROGERS,

*Appellant,*

vs.

CITY OF CHEYENNE,

*Appellee.*

—o—

**ON APPEAL FROM THE SUPREME COURT OF WYOMING**

—o—

## REPLY IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS

—o—

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## REPLY TO APPELLEE'S MOTION TO DISMISS

Pursuant to Rule 16.5 appellant hereby replies to appellee's Motion to Dismiss and requests that said motion be denied.

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## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Additional relevant constitutional and statutory provisions, not previously set forth by the parties, are herein set forth:

Article IV, Section 1 of the United States Constitution provides, in pertinent part, as follows:

> Full Faith and Credit shall be given in each State to the public acts, records, and judicial proceedings of every other State;

28 U.S.C. § 1257(2) provides as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

28 U.S.C. § 1738 provides, in pertinent part, as follows:

> Such Acts, records and judicial proceedings or copies thereof, * * * shall have the same full faith

> and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

42 U.S.C. § 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in a action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable to the District of Columbia shall be considered to be a statute of the District of Columbia.

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## SUMMARY OF ARGUMENT

1. This case presents a substantial federal question regarding the validity of airport height limitation ordinances under the "Taking Clause."

2. The doctrine of Res Judicata does not apply.

———o———

## ARGUMENT I

### THIS CASE PRESENTS A SUBSTANTIAL FEDERAL QUESTION REGARDING THE VALIDITY OF AIRPORT HEIGHT LIMITATION ORDINANCES UNDER THE "TAKING CLAUSE"

This case concerns whether or not an airport height limitation ordinance constitutes a taking when it gives to the public a permanent right to fly through the enveloping airspace above a landowner's home, at an altitude of 25 feet, causing actual damage in the amount of $2,064. Appellee, as well as the lower court, relies exclusively on the balancing tests set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), and the public benefits test found in *Village of Euclid v. Ambler Realty Co.* 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926) to support the proposition that the Wyoming Court in this case properly upheld such a height restriction ordinance as not being a "taking."

Sole reliance upon those cases ignores another very important principle found in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 73 L.Ed.2d 868, 102 S.Ct. 3164 (1982) which held that a minor but permanent physical occupation of a landowner's property, authorized by state law, constituted a "taking" under the Fifth and Fourteenth Amendments without regard to whether the action achieves an important public benefit or has only minimal impact on the owner. *Loretto, supra*, p. 426.

Justice Marshall, writing for the Court in *Loretto*, said:

> Our cases establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, "the character of the governmental action" not only is an important factor in resolving whether the action works a taking *but also is determinative.* (Emphasis Supplied). *Loretto, supra,* p. 426.

This principle was recently reiterated by Justice Scalia in *Nollan v. California Coastal Commission,* 483 U.S. —, 97 L.Ed.2d 677, 107 S.Ct. — (1987) when the court found that a government could not, without compensation, require a public easement across private land as a condition to the granting of a building permit. *Nollan, supra,* 97 L.Ed.2d p. 686.

The evidence in this case showed that compliance with the ordinance would result in an actual economic loss to the landowner in the amount of $2,964.00 *and* would grant the public a permanent right to fly through the enveloping airspace above appellant's home at an altitude of 25 feet. Thus, the uncontroverted evidence showed that the appellant-landowner would suffer both economic impact *and* physical invasion and occupation of his property.

In *United States v. Causby,* 328 U.S. 246, 66 S.Ct. 1062, 9 L.Ed. 1206 (1946) and *Griggs v. County of Allegheny, Pennsylvania,* 369 U.S. 84, 82 S.Ct. 531, 7 L.Ed.2d 585 (1962) this court held that low flying aircraft, which interfere with the existing uses of the land beneath, caused a "taking" to occur. In those cases there was no ordinance or regulation requiring the landowner, to his damage, to maintain his property to permit such low flight—yet, a "taking" was found simply by virtue of governmentally authorized low flight by the public.

The question in this case, however, is whether straight forward state action in the form of a zoning ordinance, designed to create a clear approach to an airport, (partially to satisfy federal grant conditions pursuant to the National Airport Plan, 49 U.S.C. 1718(a)(3) and (4)), is a "taking" when the evidence shows that the effect of the ordinance will be to permit aircraft to physically occupy reasonably useable enveloping airspace and cause actual economic damage. The *Causby* and *Griggs* decisions, *supra*, holding that low flying aircraft can cause a taking, together with the later decisions of *Loretto* and *Nollan*, holding that state action allowing permanent occupation and invasion by the public of private property to be a "taking," lead one to believe that a "taking" should be found in the circumstances of this case.

The same question was previously before this court in *Jankovich v. Indiana Toll Road*, 379 U.S. 487, 13 L.Ed.2d 439, 85 S.Ct. 493 (1965), prior to such decisions as *Loretto* and *Nollan*. However, since the Court in *Jankovich* eventually declined to rule on the "taking" issue, the lack of a definitive holding regarding airport height limitation ordinances has resulted, apparently, in the Wyoming Court inappropriately applying the balancing tests of *Penn Central Transportation Co.* to this case—despite uncontroverted evidence of physical occupation *and* economic impact.

To avoid a clear conflict between the holdings of this court and the Wyoming Supreme Court and to avoid confusion regarding the "determinative" factor of actual physical occupation, probable jurisdiction should be noted.

## ARGUMENT II

## THE DOCTRINE OF RES JUDICATA DOES NOT APPLY

Contrary to appellee's assertion, res judicata, comity and federalism are not issues in this case as they were in *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980). *Allen* involved an action in Federal Court under 42 U.S.C. § 1983 in which constitutional issues had previously been decided in state court. Thus, the Full Faith and Credit Clause (U.S. Const. art IV, § 1) and 28 U.S.C. § 1738 were applied.

This case is entirely different than the *Allen* case. This appeal is a "direct appeal" brought to this court pursuant to 28 U.S.C. § 1257(2) from a state court decision wherein a state law has been measured against the United States Constitution and found to be valid.

The state court below, though discussing Wyoming law on res judicata, declined to apply the doctrine and proceeded to *reaffirm* its prior holding in *Cheyenne Airport Board v. Rogers*, 707 P.2d 717 (Wyo.1985). *Rogers v. City of Cheyenne*, 747 P.2d 1137, 1189 (Wyo.1987).

Res judicata and its preclusive effect must be determined by state law. *Migra v. Warren City School District Board*, 465 U.S. 75, 79 L.Ed.2d 56, 104 S.Ct. 892 (1984). Since res judicata was discussed, but not applied, by the Wyoming Court, the issues of issue or claim preclusion are not involved here.

## CONCLUSION

This court should deny Appellee's Motion to Dismiss, probable jurisdiction should be noted and the lower court summarily reversed.

Respectfully submitted,

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